

RECENT JUDICIAL DECISIONS OF INTEREST TO ENERGY LAWYERS

KEITH MARLOWE, K.C., ALYSSA DUKE, GEOFF ADAIR,
NICOLE BAKKER, AND MATTHEW HAMMER*

This article summarizes recent judicial decisions of interest to energy lawyers. The authors review and comment on case law from the past year in several areas including: arbitration, bankruptcy and insolvency, class actions, competition law, contractual interpretation, cybersecurity, employment and labour, environment, Indigenous law, insurance law, securities litigation, and tax. The authors discuss the practical implications of the decisions and risk management strategies that may be of benefit to participants in the energy industry. The authors also highlight cases to watch in 2023.

TABLE OF CONTENTS

I.	ARBITRATION	418
	A. <i>PEACE RIVER HYDRO PARTNERS V. PETROWEST CORP.</i>	419
	B. <i>TALL SHIPS DEVELOPMENT INC. V. BROCKVILLE (CITY)</i>	421
	C. <i>OPTIVA INC. V. TBAYTEL</i>	423
II.	BANKRUPTCY AND INSOLVENCY	424
	A. <i>ORPHAN WELL ASSOCIATION</i> <i>V. TRIDENT EXPLORATION CORP.</i>	425
	B. <i>PRICEWATERHOUSECOOPERS INC.</i> <i>V. PERPETUAL ENERGY INC.</i>	426
	C. <i>VESTACON LIMITED V. HUSZTI INVESTMENTS</i> <i>(CANADA) LTD. O/A EYEWATCH</i>	428
III.	CLASS ACTIONS	429
	A. <i>SETOGUCHI V. UBER BV</i>	430
	B. CASES ABOUT WAIVER OF CLASS ACTION CLAUSES	432
	C. <i>LASANTE V. KIRK</i>	433
	D. <i>COLES V. FCA CANADA INC.</i>	435
IV.	COMPETITION LAW	436
	A. <i>REBUCK V. FORD MOTOR COMPANY</i>	437
	B. <i>CANADA (COMMISSIONER OF COMPETITION) V. ROGERS</i> <i>COMMUNICATIONS INC. AND SHAW COMMUNICATIONS INC.</i> <i>AND CANADA (COMMISSIONER OF COMPETITION)</i> <i>V. PARRISH & HEIMBECKER, LIMITED</i>	438
	C. <i>DAVID V. LOBLAW</i>	439
V.	CONTRACTUAL INTERPRETATION	440

* Keith Marlowe, K.C., Partner, Blake, Cassels & Graydon LLP, Calgary; Alyssa Duke, Partner, Blake, Cassels & Graydon LLP, Calgary; Geoff Adair, Associate, Blake, Cassels & Graydon LLP, Calgary; Nicole Bakker, Associate, Blake, Cassels & Graydon LLP, Calgary; Matthew Hammer, Associate, Blake, Cassels & Graydon LLP, Calgary. The authors would like to thank Lauren Carson, Tori Chiu, Nicolas Huertas, Chris Kim, Anthony Lyons, Saeid Rafeiean, Karen Norman, and Sean Sallis-Lyon of Blake, Cassels & Graydon LLP, Calgary for their invaluable assistance in preparing this article.



A.	<i>BOLIDEN MINERAL AB V. FQM KEVITSA SWEDEN HOLDINGS AB</i>	441
B.	<i>10443204 CANADA INC. V. 2701835 ONTARIO INC.</i>	443
C.	<i>GRETA ENERGY INC. V. PEMBINA PIPELINE CORPORATION</i>	445
D.	<i>COFFEE TIME DONUTS INCORPORATED V. 2197938 ONTARIO INC.</i>	447
VI.	CYBERSECURITY	448
A.	CASES ABOUT THE TORT OF INTRUSION UPON SECLUSION	449
VII.	EMPLOYMENT AND LABOUR	451
A.	<i>PARMAR V. TRIBE MANAGEMENT INC.</i>	452
B.	<i>KOSTECKYJ V. PARAMOUNT RESOURCES LTD.</i>	454
VIII.	ENVIRONMENT	456
A.	<i>0694841 B.C. LTD. V. ALARA ENVIRONMENTAL HEALTH AND SAFETY LIMITED</i>	456
B.	<i>PARAMOUNT RESOURCES LTD. V. GREY OWL ENGINEERING LTD.</i>	458
IX.	INDIGENOUS LAW	460
A.	<i>THOMAS AND SAIK'UZ FIRST NATION V. RIO TINTO ALCAN INC.</i>	460
B.	<i>KEHEWIN CREE NATION V. KEHEW CONSTRUCTION LTD.</i>	462
C.	<i>BENGA MINING LIMITED V. ALBERTA ENERGY REGULATOR</i>	464
X.	INSURANCE LAW	467
A.	<i>IT HAVEN INC. V. CERTAIN UNDERWRITERS AT LLOYD'S, LONDON</i>	467
B.	<i>MDS INC. V. FACTORY MUTUAL INSURANCE COMPANY</i>	469
XI.	SECURITIES LITIGATION	471
A.	<i>WONG V. PRETIUM RESOURCES INC.</i>	471
B.	<i>MARKOWICH V. LUNDIN MINING CORPORATION</i>	472
XII.	TAX	473
A.	<i>HER MAJESTY THE QUEEN V. DOW CHEMICAL CANADA ULC</i>	474
B.	<i>CANADA (ATTORNEY GENERAL) V. COLLINS FAMILY TRUST</i>	476
XIII.	CASES TO WATCH	478
A.	<i>CECILIA LA ROSE BY GUARDIAN AD LITEM ANDREA LUCIUK V. THE QUEEN</i>	478
B.	<i>CLIENTEARTH V. SHELL PLC</i>	478
C.	<i>REFERENCE RE IMPACT ASSESSMENT ACT</i>	479
D.	COMPETITION BUREAU AND SECURITIES AND EXCHANGE COMMISSION GREENWASHING AND ESG DECISIONS	480

I. ARBITRATION

The courts continue to take a restrained approach to encroaching on the ability of parties to arbitrate a dispute. In 2022, the Supreme Court of Canada confirmed when a court may stay an arbitration in favour of resolving the parties' dispute in an insolvency proceeding. Also in 2022, the courts affirmed the narrow grounds on which a court will intervene to set aside an arbitral award and validated that use of summary judgment procedures in certain arbitrations.

A. *PEACE RIVER HYDRO PARTNERS V. PETROWEST CORP.*¹

1. BACKGROUND

In *Petrowest*, arising in the context of a court-ordered receivership under the *Bankruptcy and Insolvency Act*,² the Supreme Court of Canada clarified the circumstances in which an otherwise valid arbitration agreement may be held to be inoperative in the meaning of British Columbia's domestic arbitration legislation (the *Arbitration Act*³) and similar arbitration legislation throughout Canada. Where a party to an arbitration agreement commences legal proceedings in court against another party to the agreement in respect of matters governed by the arbitration agreement, such arbitration legislation permits the party seeking to enforce the arbitration clause to apply to stay the court proceeding in favour of arbitration. In such circumstance, the *Arbitration Act* mandates a stay of the court proceedings unless the arbitration agreement is "void, inoperative or incapable of being performed."⁴

2. FACTS

Peace River Hydro Partners (Peace River) entered into several construction agreements with Petrowest Corp. (Petrowest) in connection with the construction of a hydroelectric dam in British Columbia. The parties' agreements provided that the parties arbitrate disputes arising from their relationship (collectively, the Arbitration Agreements).⁵ Petrowest became insolvent and a Receiver was appointed. The Receiver sued Peace River to recover funds allegedly owed Petrowest (the Court Action). Peace River applied for a stay of proceedings pursuant to the *Arbitration Act* and argued that the claim should be arbitrated pursuant to the Arbitration Agreements. The chambers judge dismissed the stay application and allowed the Court Action to proceed.⁶ Peace River appealed, and the British Columbia Court of Appeal upheld the dismissal of the stay.⁷ Peace River further appealed to the Supreme Court of Canada.

3. DECISION

The Supreme Court of Canada dismissed Peace River's appeal and also affirmed the dismissal of the stay. The Supreme Court determined that the Court Action should be permitted to proceed on the basis that the Arbitration Agreements were inoperative. The Supreme Court held that the *Arbitration Act* does not require a court to stay a civil claim brought by a court-appointed receiver in every case where the claim is subject to an otherwise valid arbitration agreement.⁸

The majority reviewed the similarities between arbitration and *BIA* proceedings: both are aimed towards expediency, procedural flexibility, and specialized expertise. Generally, these

¹ 2022 SCC 41 [*Petrowest*].

² RSC 1985, c B-3 [*BIA*].

³ SBC 2020, c 2.

⁴ *Ibid*, s 7(2).

⁵ *Petrowest*, *supra* note 1 at para 2.

⁶ *Ibid* at paras 14–17, 27.

⁷ *Ibid* at paras 28–31.

⁸ *Ibid* at paras 34–36.

shared interests will converge through arbitration.⁹ However, in certain insolvency matters, the *BIA* “single proceeding model” may be necessary to preclude arbitration proceedings. The Supreme Court observed that the *BIA* grants the courts a broad power to determine that an arbitration agreement is “inoperative” in the face of parallel insolvency proceedings.¹⁰ In particular, a court may find an arbitration agreement to be inoperative in the insolvency context, and a centralized judicial process to be necessary, where the party seeking to avoid the arbitration can establish that submitting the dispute to arbitration “would compromise the orderly and efficient conduct of a court-ordered receivership.”¹¹

The Supreme Court cautioned that courts must be careful when considering whether to refuse to stay a court proceeding in favour of arbitration. Dismissing a stay of proceedings where there is an arbitration agreement is necessarily a highly factual exercise that requires a two-part framework of analysis. This analysis is applicable to all provincial arbitration statutes, as they share similar language.¹²

The determination of whether an arbitration agreement is inoperative is a highly factual exercise. The Supreme Court set out a non-exhaustive list of factors to assess whether an arbitration agreement is “inoperative” in the context of insolvency proceedings:

- (a) The effect of arbitration on the integrity of the insolvency proceedings.
...
- (b) The relative prejudice to the parties from the referral of the dispute to arbitration.
...
- (c) The urgency of resolving the dispute.
...
- (d) The applicability of a stay of proceedings under bankruptcy or insolvency law.
...
- (e) Any other factor the court considers material in the circumstances.¹³

These non-exhaustive factors may carry more or less weight depending on the circumstances of the case, and none alone is determinative.¹⁴

⁹ *Ibid* at para 72.

¹⁰ *Ibid* at paras 55, 73; *BIA*, *supra* note 2, ss 183(1), 243(1).

¹¹ *Petrowest*, *ibid* at para 73.

¹² *Ibid* at paras 73–76.

¹³ *Ibid* at para 155 [emphasis omitted].

¹⁴ *Ibid* at para 156.

Applying these factors, the Supreme Court held that Petrowest met its burden. The multiple overlapping arbitration proceedings as structured by the Arbitration Agreements increased complexity and expense to the point that “enforcing the Arbitration Agreements would compromise the orderly and efficient resolution of the receivership, contrary to the purposes of the *BIA*.”¹⁵ Funding for these proceedings would necessarily come from the estate of Petrowest, to the detriment of the creditors. Furthermore, the piecemeal arbitration would result in the same arguments repeated in different forums, creating a serious risk of conflicting outcomes.¹⁶ Accordingly, the Arbitration Agreements were inoperative within the meaning of the *Arbitration Act*.¹⁷

4. COMMENTARY

The Supreme Court of Canada’s decision is a strong statement as to the broad jurisdiction granted to courts in an insolvency proceeding. According to the Supreme Court, courts are empowered to take the steps deemed necessary to meet the objectives of insolvency legislation: efficient dispute resolution and maximization of value for creditors. However, arbitration legislation varies across provinces. Court-appointed receivers seeking to avoid the application of arbitration agreements should seek advice that considers the facts and arbitration legislation specific to each case. Court-appointed receivers should also consider seeking directions in the supervising court before commencing court proceedings in connection with a dispute that is subject to an arbitration agreement governed by the *Arbitration Act* or other provincial arbitration legislation.

B. *TALL SHIPS DEVELOPMENT INC. v. BROCKVILLE (CITY)*¹⁸

1. BACKGROUND

In *Tall Ships*, the Ontario Court of Appeal affirmed that courts are very reluctant to set aside arbitral awards and will interpret an arbitrator’s decision in a manner that protects it from review, other than in exceptional circumstances. At the heart of *Tall Ships* was whether the application judge at the Ontario Superior Court of Justice had properly characterized the questions before her as extricable questions of law.¹⁹

2. FACTS

The City of Brockville (the City) and Tall Ships Landing Development Ltd. (Tall Ships) entered into a partnership whereby Tall Ships would develop reclaimed land in downtown Brockville and transfer a particular building to the City. The budget to construct this building was \$7.4 million. However, the actual construction cost at the time that Tall Ships transferred the building to the City was \$1.8 million higher. The parties commenced arbitration to determine if the City was liable to Tall Ships for the additional \$1.8 million. In its statement of claim, Tall Ships also claimed interest on the amounts owed, but never advised the City

¹⁵ *Ibid* at para 187.

¹⁶ *Ibid* at paras 174–75.

¹⁷ *Ibid* at para 188.

¹⁸ 2022 ONCA 861 [*Tall Ships*].

¹⁹ *Ibid* at para 2.

that it would seek such interest. In his award, the arbitrator determined that Tall Ships was responsible for the cost overruns and the City was therefore not responsible for the additional \$1.8 million. The arbitrator also rejected Tall Ships' claim for interest on the amounts. Tall Ships sought to set aside the awards. The application judge set aside the awards and ordered that a new arbitrator be appointed to reconsider the claims. The City appealed to the Ontario Court of Appeal.²⁰

3. DECISION

The City argued that the questions before the arbitrator were of mixed fact and law, which did not give rise to any right of appeal. Tall Ships argued that the arbitrator committed extricable errors of law, so the application judge was correct in setting aside the awards.²¹ The arbitrator had used the language "time of the essence" in interpreting the parties' agreement, but there was no such term in the agreement, nor had the parties advanced this argument. The application judge had held that this was an extricable error of law and had set aside the awards.²²

The Ontario Court of Appeal held that the arbitrator had not used the phrase "time of the essence" as a term of art. The arbitrator had clearly based his awards on the contractual language and factual matrix before him, not on an implied "time of the essence" provision.²³ As a finding of mixed fact and law, there was no extricable error of law and the application judge had no jurisdiction to hear Tall Ships' application.²⁴

The application judge had also focused on what she considered to be a legal error by the arbitrator imputing construction manager duties onto Tall Ships. However, the arbitrator had not found that Tall Ships was simply a construction manager. Rather, "he considered the contract as a whole within the context of the project as a whole," to determine what obligations Tall Ships had towards the City.²⁵ This, too, was a question of mixed fact and law and not subject to appeal.²⁶ The Court of Appeal also found no extricable error of law pertaining to the arbitrator's findings that Tall Ships was not entitled to interest.²⁷ The Court granted the City's appeal and reinstated the arbitrator's award. The Court cautioned that "judges should not be too ready to characterize particular issues as issues of law."²⁸

4. COMMENTARY

In *Tall Ships*, the Ontario Court of Appeal reaffirmed that questions of mixed fact and law are not subject to appeal under section 45 of the Ontario *Arbitration Act, 1991*,²⁹ and that "the circumstances in which a question of law can be extricated from the interpretation process

²⁰ *Ibid* at paras 4–14.

²¹ *Ibid* at para 14.

²² *Ibid* at paras 25–26.

²³ *Ibid* at para 47.

²⁴ *Ibid* at para 49.

²⁵ *Ibid* at para 72.

²⁶ *Ibid*.

²⁷ *Ibid* at para 96.

²⁸ *Ibid* at para 16.

²⁹ *Ibid* at para 95; SO 1991, c 17.

will be rare.”³⁰ Because the *Arbitration Act, 1991* has similar appeal language to the Alberta *Arbitration Act*³¹ and other provincial arbitration acts, the principles of *Tall Ships* are broadly applicable.

C. *OPTIVA INC. v. TBAYTEL*³²

1. BACKGROUND

The *Optiva* decision affirms that arbitrators have the power, through either statutory language or broad language in the arbitration agreement, to determine that summary actions are available at arbitration even if the arbitration agreement is silent on the matter.

2. FACTS

Thunder Bay Telephone (Tbaytel) and Optiva Inc. (Optiva) entered into a purchase and services agreement (the Agreement). The Agreement contained an arbitration clause. Problems soon developed, which led Tbaytel to terminate the Agreement, alleging that Optiva had breached various terms.³³ The parties commenced arbitration on various issues. Tbaytel considered that it had sufficient admissions of fact from Optiva’s officers and employees to have some issues determined by a summary judgment motion and sought to do so.³⁴ The arbitrator determined that summary judgment was an option open to the parties, and granted some of Tbaytel’s claims against Optiva. Optiva appealed the award to the Ontario Superior Court of Justice and, when unsuccessful, appealed to the Ontario Court of Appeal. Optiva argued, among other things, that since the Agreement was silent about summary judgment, the arbitrator was not permitted to proceed by summary judgment, and the award should be set aside.³⁵

3. DECISION

The Ontario Court of Appeal, among other findings, determined that section 17 of the *Arbitration Act, 1991*,³⁶ did not apply to Optiva’s notice of dispute to the arbitrator. Section 17(1) of the *Arbitration Act, 1991*, pertained to arbitrators’ determination of their jurisdiction “over the *entire substance* or subject matter of the case, not [merely their] jurisdiction to make interlocutory or procedural orders that do not determine the merits of the dispute.”³⁷ The Court of Appeal further held that the arbitrator had the power to determine whether summary judgment was available. The parties collectively chose their arbitrator and gave him broad powers to conduct the arbitration. At section 8.1 of the Agreement, the parties gave the arbitrator jurisdiction to consider and rule upon “all motions ... without

³⁰ *Tall Ships*, *ibid* at para 16, citing *Sattva Capital Corp v. Creston Moly Corp*, 2014 SCC 53 at para 55 [*Sattva*].

³¹ RSA 2000, c A-43.

³² 2022 ONCA 646 [*Optiva*].

³³ *Ibid* at paras 1–2.

³⁴ *Ibid* at para 8.

³⁵ *Ibid* at paras 10–16, 19–21, 35.

³⁶ *Arbitration Act, 1991*, *supra* note 29, s 17.

³⁷ *Optiva*, *supra* note 32 at para 25, citing *Inforica Inc v CGI Information Systems and Management Consultants Inc*, 2009 ONCA 642 at para 16 [emphasis added].

limitation.”³⁸ The parties provided non-exhaustive examples of this wide authority. Furthermore, the parties gave the arbitrator exclusive jurisdiction to interpret the terms of the Agreement.³⁹ Finally, the parties also explicitly did not limit the arbitrator’s statutory powers under the *Arbitration Act, 1991*. The *Arbitration Act, 1991* also permitted the arbitrator to determine all procedural steps in a “hearing.”⁴⁰ It was open to the arbitrator, and it was not unfair to Optiva to proceed by way of summary judgment motion.⁴¹ The Court dismissed the appeal.

4. COMMENTARY

Optiva confirms that summary judgment motions are available in an arbitration proceeding. The Court of Appeal noted that the benefits of summary judgment as identified by the Supreme Court of Canada in *Hryniak v. Mauldin*⁴² are just as present and applicable in an arbitration as they are in court.⁴³ There was nothing manifestly unfair about an arbitrator determining that a summary judgment motion was open to the parties on the basis of the *Act* and the Agreement.⁴⁴ Accordingly, businesses should endeavour to clarify which procedures are available and not available in their arbitration agreements.

II. BANKRUPTCY AND INSOLVENCY

During the past year, global markets entered into a period of uncertainty caused by, among other things, declining post-COVID-19 government stimulus, rising interest rates, and the war in Ukraine and the associated sanctions imposed by Western governments. In the face of this uncertainty, corporate insolvency filings are on the rise in Canada.

In this context, we address several bankruptcy and insolvency decisions issued in 2022 that are significant for energy lawyers. The *Orphan Well Association v. Trident Exploration Corp.*⁴⁵ and *PricewaterhouseCoopers Inc. v. Perpetual Energy Inc.*⁴⁶ decisions provide further clarity about the treatment of abandonment and reclamation obligations (ARO) in insolvency following the Supreme Court of Canada’s pivotal decision in *Orphan Well Association v. Grant Thornton Ltd.*⁴⁷ The *Vestacon* decision of the Ontario Superior Court of Justice clarifies the application of fraudulent conveyances legislation to heavily encumbered assets.⁴⁸

³⁸ *Optiva*, *ibid* at para 30.

³⁹ *Ibid* at paras 29–32.

⁴⁰ *Ibid* at paras 37–38; *Arbitration Act, 1991*, *supra* note 29, ss 20(1), 26(1).

⁴¹ *Optiva*, *ibid* at paras 40–50.

⁴² 2014 SCC 7, Karakatsanis J (“[t]he summary judgment motion is an important tool for enhancing access to justice because it can provide a cheaper, faster alternative to a full trial” at para 34).

⁴³ *Optiva*, *supra* note 32 at para 38.

⁴⁴ *Ibid* at para 49.

⁴⁵ 2022 ABKB 839 [*Trident Exploration*].

⁴⁶ 2022 ABCA 111 [*Perpetual Energy*].

⁴⁷ 2019 SCC 5 [*Redwater*].

⁴⁸ *Vestacon Limited v Huszti Investments (Canada) Ltd o/a Eyewatch*, 2022 ONSC 2104 [*Vestacon*].

**A. ORPHAN WELL ASSOCIATION
V. TRIDENT EXPLORATION CORP.**⁴⁹

1. BACKGROUND

Trident Exploration clarifies the application of the *Redwater* decision in two important respects. First, the Alberta Court of King’s Bench confirmed that the Alberta Energy Regulator (AER) and Orphan Well Association (OWA) are entitled to super priority of payment from the sale proceeds of all of a bankrupt oil and gas company’s assets, including its realty. Second, the Court confirmed that ARO owed to the AER/OWA have super priority of payment before municipal taxes incurred during receivership.

2. FACTS

Trident Exploration Corp. (Trident) was a group of privately held oil and gas exploration and production companies and partnerships.⁵⁰ In April 2019, Trident ceased operations after failing to restructure its business.⁵¹ At the time, Trident’s outstanding financial obligations included approximately \$407 million in ARO.⁵²

As a result of Trident’s decision to cease operating, its licences were returned to the AER and its ARO were transferred to the OWA.⁵³ The OWA subsequently applied to the Alberta Court of King’s Bench for an order appointing a receiver.⁵⁴

In May 2019, the OWA was granted a receivership order to sell Trident’s assets to solvent oil and gas companies that would assume its ARO.⁵⁵ The receiver determined that it would be uneconomical to operate Trident’s assets and instead focused on safely shutting them in before initiating a sales process.⁵⁶ Roughly 66 percent of Trident’s ARO was ultimately assumed by other companies through that process.⁵⁷

The receiver applied to the Court seeking advice and directions about how to distribute \$900,000 in remaining funds, some or all of which were generated by selling Trident’s non-oil and gas realty.⁵⁸ The AER and OWA took the position that they should receive the remaining funds pursuant to the super priority for ARO as prescribed by *Redwater*. Several municipalities took the position that they should share with the AER and OWA in receiving payment from the remaining funds due to an alleged “parallel priority” as between ARO and unpaid municipal taxes incurred during Trident’s receivership.⁵⁹

⁴⁹ *Trident Exploration*, *supra* note 45.

⁵⁰ *Ibid* at para 1.

⁵¹ *Ibid* at para 2.

⁵² *Ibid* at para 3.

⁵³ *Ibid* at para 4.

⁵⁴ *Ibid* at para 6.

⁵⁵ *Ibid* at paras 6–8.

⁵⁶ *Ibid* at paras 9–11.

⁵⁷ *Ibid* at paras 12, 14.

⁵⁸ *Ibid* at para 15.

⁵⁹ *Ibid*.

3. DECISION

The Alberta Court of King's Bench held that the AER and OWA were entitled to super priority of payment from the remaining funds generated from all of Trident's assets, including its non-oil and gas realty.⁶⁰ Since Trident's sole business was in the exploration and production of oil and gas, there was no reason to differentiate its realty from its oil and gas assets in generating funds to pay its ARO.⁶¹

Further, the Court held that the receiver was not required to pay Trident's municipal taxes incurred during the receivership because its ARO had super priority of payment.⁶² While the municipalities argued that they had a public interest mandate that was similar to the AER and OWA, the Court did not agree that the payment of municipal taxes had any higher public interest component than the payment of other debts.⁶³ The Court held that the unpaid municipal taxes were merely a monetary obligation, whereas ARO were a public duty with a corresponding regulatory obligation.⁶⁴

4. COMMENTARY

Trident Exploration is one in a series of post-*Redwater* decisions that have clarified the application of the super priority for ARO. This decision confirms that the super priority applies to all of a bankrupt oil and gas producer's assets, not simply licenced assets, and that post-receivership municipal taxes do not have a parallel priority.

After *Trident Exploration*, creditors may have more difficulty recovering debts owed to them by a bankrupt oil and gas company in insolvency proceedings, even if those debts are secured against realty. The ARO super priority applies to all assets owned by a company that is in the sole business of exploration and production of oil and gas. This increases the likelihood that there will be no assets of any type available to satisfy secured and unsecured creditors once ARO have been accounted for.

B. *PRICEWATERHOUSECOOPERS INC.* *V. PERPETUAL ENERGY INC.*⁶⁵

1. BACKGROUND

In *Perpetual Energy*, the Alberta Court of Appeal held that ARO must be accounted for as part of undertaking a balance sheet solvency test.⁶⁶

⁶⁰ *Ibid* at paras 17, 67, 80.

⁶¹ *Ibid* at para 67.

⁶² *Ibid* at paras 17, 61–63.

⁶³ *Ibid* at para 60.

⁶⁴ *Ibid* at paras 48, 61–63.

⁶⁵ *Perpetual Energy*, *supra* note 46.

⁶⁶ *BIA*, *supra* note 2, s 2(c) (definition of an “insolvent person”); *Perpetual Energy*, *ibid* at para 16.

2. FACTS

Sequoia Resources Corp. (Sequoia) was previously Perpetual Energy Operating Corp. (PEOC).⁶⁷ The Perpetual Energy group of companies (Perpetual) executed a corporate reorganization that caused PEOC to receive assets that were encumbered with significant ARO for nominal consideration, with PEOC then being acquired by a third party following which its name was changed to Sequoia.⁶⁸ Approximately 17 months later, Sequoia assigned itself into bankruptcy.⁶⁹

Sequoia's trustee in bankruptcy (the Trustee) sued Perpetual alleging that the assumed assets subject to ARO were transferred for approximately \$217 million below their fair market value such that it was a transfer at undervalue pursuant to section 96 of the *BIA*.⁷⁰ Among other things, the Trustee had to prove that Sequoia was insolvent at the time of the transfer or was rendered insolvent by the transfer.⁷¹ Perpetual was granted summary dismissal of the Trustee's claim.⁷² The Trustee appealed.⁷³

3. DECISION

The Alberta Court of Appeal held that the chambers judge erred by not properly accounting for Sequoia's ARO.⁷⁴ Specifically, Sequoia's ARO formed part of its assets' value in determining whether it was insolvent at the time of the transfer pursuant to the balance sheet solvency test.⁷⁵

The Court of Appeal noted that, since *Redwater*, ARO are an inherent part of the value of licenced oil and gas assets and operate to depress asset value.⁷⁶ While the Court recognized that ARO are not easily quantified, and their valuation may depend on various contingencies and assumptions, it held that ARO cannot be assigned nil value until all end-of-life obligations have been fully performed.⁷⁷

4. COMMENTARY

Perpetual Energy clarifies that oil and gas companies must account for end-of-life obligations when assessing the value of their assets for the purposes of determining solvency. As was the case here, a company can become insolvent due to ARO.

Companies with complex corporate structures should be careful about how assets are held among related entities so as not to render them insolvent. Otherwise, transfers between corporate entities at undervalue may be unwound pursuant to section 96 of the *BIA*.

⁶⁷ *Perpetual Energy*, *ibid* at para 4.

⁶⁸ *Ibid* at paras 4–6.

⁶⁹ *Ibid* at para 4.

⁷⁰ *Ibid* at paras 1, 6, 67; *BIA*, *supra* note 2, s 96.

⁷¹ *Perpetual Energy*, *ibid* at paras 1, 32–33.

⁷² *Ibid* at para 2.

⁷³ *Ibid* at para 24.

⁷⁴ *Ibid* at para 70.

⁷⁵ *Ibid* at paras 3, 31, 39, 46.

⁷⁶ *Ibid* at para 39.

⁷⁷ *Ibid* at paras 45, 49.

C. *VESTACON LIMITED V. HUSZTI INVESTMENTS (CANADA) LTD. O/A EYEWATCH*⁷⁸

1. BACKGROUND

Vestacon confirms that, in appropriate circumstances, a company on the eve of insolvency can transfer a highly encumbered asset to pay its secured creditors without offending section 2 of the *Fraudulent Conveyances Act*,⁷⁹ which voids the conveyance of property with the intent to defeat creditors, notwithstanding that the transfer would deprive its unsecured creditors of a remedy.

2. FACTS

Huszti Investments (Canada) Ltd. (Huszti) purchased three unfinished commercial units in a building in Toronto.⁸⁰ As part of financing the purchase and completion of those units, three mortgages were registered against the units.⁸¹ Huszti hired *Vestacon Limited* (*Vestacon*) to do the construction work on the units and that work was substantially completed by June 2017.⁸²

Vestacon delivered several invoices to Huszti, most of which went unpaid.⁸³ Huszti promised to pay the outstanding *Vestacon* invoices on numerous occasions, and the parties agreed to a payment schedule.⁸⁴ However, *Vestacon* did not take any further steps to protect its interests such as by registering a construction lien against the units.⁸⁵

In addition to its failure to pay the *Vestacon* invoices, Huszti also defaulted on its mortgages.⁸⁶ In October 2017, the first mortgagee issued a notice of power of sale.⁸⁷ The third mortgagee subsequently agreed to purchase the units from Huszti for value, and the sale proceeds were used by Huszti to pay the first and second mortgagees.⁸⁸

Vestacon sued Huszti and the third mortgagee alleging, among other things, that the sale was a fraudulent conveyance pursuant to section 2 of the *Fraudulent Conveyances Act*.⁸⁹ The third mortgagee applied to have the claim against it summarily dismissed.⁹⁰

⁷⁸ *Vestacon*, *supra* note 48.
⁷⁹ RSO 1990, c F.29, s 2 [*Fraud Act*].
⁸⁰ *Vestacon*, *supra* note 48 at para 2.
⁸¹ *Ibid* at paras 3–6.
⁸² *Ibid* at paras 7–8.
⁸³ *Ibid* at para 8.
⁸⁴ *Ibid* at para 9.
⁸⁵ *Ibid* at para 10.
⁸⁶ *Ibid* at para 11.
⁸⁷ *Ibid*.
⁸⁸ *Ibid* at paras 12–13, 48.
⁸⁹ *Ibid* at paras 14, 31; *Fraud Act*, *supra* note 79, s 2.
⁹⁰ *Vestacon*, *ibid* at para 15.

3. DECISION

In order to succeed in its claim, Vestacon had the onus to prove that Huszti had intended to “defeat, hinder, delay or defraud”⁹¹ Vestacon through the sale to the third mortgagee.⁹² Vestacon was also required to establish that the third mortgagee had knowledge of Huszti’s fraudulent intent.⁹³

The Ontario Superior Court of Justice noted that when “a debtor transfers [its] only remaining asset with which [it] may pay [its] debts, there is a presumption of an intention to defeat creditors.”⁹⁴ The Court also accepted that Huszti was insolvent or nearly insolvent at the time of the transfer.⁹⁵ However, the Court placed significant weight on the fact that the first mortgagee had issued the notice of sale. Accordingly, if Huszti had not sold the assets, they would have been sold by the first mortgagee in any event.⁹⁶

The Court held that, while disposing of one’s last assets and facing imminent insolvency are recognized badges of fraud, “they create a stronger suspicion of fraud when the conveyance at issue is of an unencumbered asset.”⁹⁷ In this case, Huszti used the proceeds of the sale to pay back the secured creditors who had registrations against the assets.⁹⁸ Since Huszti had an obligation to pay those secured creditors, the Court held that the transfer did not constitute a fraudulent conveyance.⁹⁹

4. COMMENTARY

Vestacon confirms that a party facing imminent insolvency may transfer a highly encumbered asset to a third party for value and use the proceeds to pay its secured creditors. Creditors with lower priority who do not recover the amounts owing to them are unlikely to be successful in challenging the transfer on the basis that it was a fraudulent conveyance, absent other badges of fraud.

III. CLASS ACTIONS

There were several important class action decisions in 2022.

In particular, notwithstanding the generally low threshold to certify class actions, case management justices are increasingly exercising their gatekeeping powers to weed out unmeritorious actions prior to certification. Courts are carefully scrutinizing putative class proceedings to determine if a class proceeding is truly the preferable means of resolving a dispute.

⁹¹ *Fraud Act*, *supra* note 79, s 2.

⁹² *Vestacon*, *supra* note 48 at para 31.

⁹³ *Ibid* at para 32. See also the *Fraudulent Conveyances Act, 1571*. Formally cited as *An Act against Fraudulent Deeds, Gifts, Alienations, etc* (UK), 1571, 13 Eliz I, c 5, the *Act* remains in force in other provinces and uses nearly identical language: “to delay, hinder, or defraud” at 537.

⁹⁴ *Vestacon*, *ibid* at para 36.

⁹⁵ *Ibid* at para 48.

⁹⁶ *Ibid*.

⁹⁷ *Ibid*.

⁹⁸ *Ibid*.

⁹⁹ *Ibid* at paras 48, 58.

In addition, we note that plaintiffs continue to have difficulty bringing and succeeding in an environmental class action in Canada. Below, we discuss one decision in which a class faced significant hurdles to achieve certification.

Finally, we continue to watch with interest cases in which courts have attempted to reconcile if, and to what extent, an arbitration clause in a contract may prevent a counterparty from bringing a class action against another party. The approaches of different courts can help provide guidance about how these clauses will be enforced in other circumstances.

A. *SETOGUCHI V. UBER BV*¹⁰⁰

1. BACKGROUND

In *Setoguchi*, the Alberta Court of Appeal was asked to determine if: (1) a negligence claim, as pleaded, disclosed a cause of action recognized at law; and (2) a class action was the preferable means of resolving the claim of the putative class.¹⁰¹

In reaching its decision, the Court of Appeal provided helpful guidance about the gatekeeping role that case management justices play in certification applications brought pursuant to section 5(1)(a) of the *Class Proceedings Act*.¹⁰²

2. FACTS

In October 2016, hackers illegally accessed data that Uber BV (Uber) had collected from its drivers and users and stored in a third party cloud-based service. The breach resulted in the theft of personal information, including names, phone numbers, and email addresses of Uber drivers and users worldwide. Uber paid a ransom to the hackers in return for an assurance that the data would be destroyed.¹⁰³

The proposed representative plaintiff, Dione Setoguchi, was an Uber user at the time of the data breach. She commenced a proposed class action against Uber for breach of contract and negligence. Setoguchi alleged that Uber had breached its user and privacy agreements, and breached its duty of care to the class members, by failing to take adequate measures to protect users' personal information.¹⁰⁴

At the certification application, the case management justice refused to certify the proceeding as a class proceeding.¹⁰⁵ In his reasons for decision, the justice said that certification should not be granted if it is "plain and obvious" that the class could not succeed and if there is no basis in fact for compensable harm beyond a *de minimis* level.¹⁰⁶ However, he reluctantly held that the "some basis in fact" test at certification did not apply to a cause of action for negligence that had otherwise been fully pleaded, even if there were no or only

¹⁰⁰ 2023 ABCA 45 [*Setoguchi*].

¹⁰¹ *Ibid* at para 5.

¹⁰² SA 2003, c C-16.5, s 5(1)(a) [*CPA*].

¹⁰³ *Setoguchi*, *supra* note 100 at para 7.

¹⁰⁴ *Ibid* at paras 9–13.

¹⁰⁵ *Setoguchi v Uber BV*, 2021 ABQB 18.

¹⁰⁶ *Setoguchi*, *supra* note 100 at para 23.

de minimis damages.¹⁰⁷ Accordingly, the justice accepted that Setoguchi had satisfied the cause of action certification criterion under section 5(1)(a) of the *CPA*.¹⁰⁸

However, the case management justice went on to deny certification because he found that a class action was not the preferable procedure of resolving the dispute. This was because he was of the view that the judicial resources required for the action to proceed were disproportionate to the nominal damages that would flow to the class members if they were entirely successful.¹⁰⁹ Setoguchi appealed.¹¹⁰

3. DECISION

The Alberta Court of Appeal dismissed the appeal.¹¹¹ In reaching this result, the Court of Appeal confirmed that the “some basis in fact” test does not apply to the cause of action criterion in section 5(1)(a) of the *CPA*.¹¹² However, the Court of Appeal held that section 5(1)(a) should not be treated as a “perfunctory exercise” and a case management justice must consider if *each* element of a cause of action is or ought to be recognized at law.¹¹³ This is particularly the case if a novel claim is raised.¹¹⁴

Referring to various authorities from Canada and the United States, the Court concluded that the theft of personal information, without more, does not give rise to legally compensable loss.¹¹⁵ Even if class members might be marginally worse off because of the theft of their personal information, the damage flowing from the theft, without more, would be negligible.¹¹⁶ The Court refused to certify the negligence claim because damage, which is a key element of the cause of action, could not be shown at the certification stage.¹¹⁷

Regarding the preferable procedure criterion, the Court held that it was entirely proper for the case management justice to ask what purpose the action would serve in the context of class proceedings, especially given that only nominal damages were sought.¹¹⁸ The Court also held that it was appropriate for the case management justice to weigh the considerable judicial resources that a class proceeding would require relative to the amount and nature of the proposed claim.¹¹⁹

Further, in light of the negative press and significant regulatory penalties already imposed on Uber, the Court rejected Setoguchi’s argument that additional behaviour modification would be achieved if the action proceeded as a class proceeding.¹²⁰

¹⁰⁷ *Ibid* at para 25.

¹⁰⁸ *Ibid*.

¹⁰⁹ *Ibid* at paras 4, 61, 68.

¹¹⁰ *Ibid* at paras 1–3.

¹¹¹ *Ibid* at paras 6, 78.

¹¹² *Ibid* at para 29.

¹¹³ *Ibid* at para 44.

¹¹⁴ *Ibid*.

¹¹⁵ *Ibid* at paras 55–57.

¹¹⁶ *Ibid* at para 58.

¹¹⁷ *Ibid* at paras 59–61.

¹¹⁸ *Ibid* at paras 69–75.

¹¹⁹ *Ibid* at para 75.

¹²⁰ *Ibid* at para 77.

4. COMMENTARY

Setoguchi provides helpful clarification about section 5(1)(a) of the *CPA* and confirmation of the role of a case management justice as gatekeeper. In particular, the Alberta Court of Appeal emphasized that:

- Neither evidence nor “some basis in fact” is required to determine if a pleading discloses a cause of action under section 5(1)(a) of the *CPA*.
- Courts must carefully consider if each element of a cause of action is, or ought to be, recognized at law, particularly if a novel claim has been alleged.
- Courts must exercise their gatekeeping function by disposing of claims at the pleadings stage if it is appropriate to do so. This includes causes of action for which damages are an essential ingredient, such as negligence claims. If damage cannot be demonstrated at the certification stage, then a case management justice should deny certification.

B. CASES ABOUT WAIVER OF CLASS ACTION CLAUSES

1. BACKGROUND

Recently, courts in several jurisdictions across Canada have been tasked with deciding if, and to what extent, an arbitration clause in a contract may prevent a counterparty from bringing a class action against another party.

2. DECISIONS

In this section, we discuss three cases, namely: (1) *Pokornik v. SkipTheDishes Restaurant Services Inc.*;¹²¹ (2) *Petty v. Niantic Inc.*;¹²² and (3) *Difederico v. Amazon.com, Inc.*¹²³ In each case, the courts adopted different approaches to reconcile the ability of a contractual counterparty to bring a class action in the face of an arbitration clause.

In *Pokornik*, the Manitoba Court of King’s Bench held that an arbitration clause may be unconscionable if it operates as a waiver of class action.¹²⁴ In particular, the Court said that an arbitration clause could be unconscionable if the clause was drafted by a powerful party with more bargaining power in a standard form contract of adhesion.¹²⁵ The Court noted that class actions provide access to justice and an arbitration clause that operates as a waiver of class action may “undermine [the] principle of efficient adjudication of claims on a class basis.”¹²⁶ The Court in *Pokornik* may have been concerned that arbitrating on an individual-

¹²¹ 2022 MBKB 178 [*Pokornik*].

¹²² 2022 BCSC 1077 [*Petty*].

¹²³ Indexed as *Stephanie Difederico and Jameson Edmond Casey v Amazon.com Inc, Amazon.com.ca Inc, Amazon.com Services LLC, Amazon Services International Inc, and Amazon Service Contracts Inc*, 2022 FC 1256 [*Difederico*].

¹²⁴ *Pokornik*, *supra* note 121 at paras 40, 46.

¹²⁵ *Ibid* at paras 36–39.

¹²⁶ *Ibid* at para 41.

by-individual basis, particularly in a jurisdiction in which the weaker party does not reside, is unlikely to be the preferable means of resolving a dispute with a more powerful party.¹²⁷

In *Petty*, the British Columbia Supreme Court held that a waiver of class action is not unconscionable or void due to public policy if the waiver includes: (1) an opt-out time period; (2) a choice between arbitration and commencing small claims court proceedings as “access to justice alternatives”; and (3) the possibility of recovering the costs associated with the arbitration.¹²⁸ In a case involving complex issues and claims of a relatively low monetary value, a class action waiver will not always be found to be unconscionable.¹²⁹

In *Difederico*, the Federal Court held that a challenge to the arbitrator’s jurisdiction or the validity of the waiver of class action should be argued before the arbitrator.¹³⁰ Further, it must be “clear on the record” that a referral to arbitration will raise a real prospect of denial of access to justice such that no relief would be available to the challenging party.¹³¹ In that regard, the Federal Court held that access to justice will not be denied if a party is permitted to participate in an arbitral proceeding held in another jurisdiction by telephone, written submission, or at a mutually agreed on location, and at minimal cost.¹³²

3. COMMENTARY

Read together, these cases demonstrate that a court will assess if a waiver of class action in favour of arbitration in another jurisdiction upholds access to justice in light of the circumstances, including its expected cost and other available adjudication methods. However, there appears to be no judicial consensus about when waiver clauses will be held to be void for unconscionability or public policy.

C. *LASANTE V. KIRK*¹³³

1. BACKGROUND

In *Kirk*, the British Columbia Court of Appeal was asked to determine if a putative class action, which included among other claims a claim for nuisance, should be certified. The putative class action arose because of evacuation and water use orders issued in response to an environmental spill and the Court of Appeal commented on common experience in an environmental context.

2. FACTS

In 2013, a tanker truck spilled jet fuel into several waterways. Among other things, several evacuation and water use orders were issued for the affected areas.¹³⁴

¹²⁷ See for instance *ibid* at para 3.

¹²⁸ *Petty*, *supra* note 122 at paras 35, 59, 74–76, 79, 91.

¹²⁹ *Ibid* at para 81.

¹³⁰ *Difederico*, *supra* note 123 at para 2.

¹³¹ *Ibid* at paras 112, 116.

¹³² *Ibid* at paras 117–118.

¹³³ 2023 BCCA 28 [*Kirk*].

¹³⁴ *Ibid* at para 1.

The representative plaintiff brought a class action against the truck driver on behalf of a class of persons who owned, leased, rented, or occupied real property in the affected areas.¹³⁵ He alleged that the spill was a “single incident mass tort” and brought claims in negligence, nuisance, and strict liability.¹³⁶ However, the nuisance claim arose from the orders, rather than the spill itself, to avoid having to assess the degree of contamination or pollution of each individual property to establish liability.¹³⁷

The defendants argued that the nuisance claim was not certifiable because “what happened affected different properties at different times and different class members in different ways, with the result that there is no common experience.”¹³⁸ The certification justice did not accept that argument and held that the Court could determine if the orders caused substantial interference to the class.

The certification justice certified the class based on the common issues about whether: (1) the orders were a nuisance; and (2) damages could be assessed on an aggregate basis.¹³⁹ The defendants appealed.¹⁴⁰

3. DECISION

The British Columbia Court of Appeal dismissed the appeal.¹⁴¹ The Court of Appeal held that it was open to the certification justice to certify a common issue solely on the fact of the orders.¹⁴²

As the Court noted, the orders applied to all class members. The orders affected the use and enjoyment of property.¹⁴³ While the class might fail to prove that nuisance extends to an interference with the right to use one’s property, rather than with the property itself, the claim was not “bound to fail.”¹⁴⁴ While some class members may have suffered no loss, such that the interference with their property was not unreasonable, this would have to be determined in a damages analysis, which would be partly tried on an individual basis.¹⁴⁵ Any issues about subclasses of members could be addressed post-certification.¹⁴⁶

The Court held that the certification justice did not err in finding that aggregate damages flowing from nuisance were certifiable as a common issue.¹⁴⁷

¹³⁵ *Ibid* at para 2.

¹³⁶ *Ibid*.

¹³⁷ *Ibid* at paras 9–10.

¹³⁸ *Ibid* at para 10.

¹³⁹ *Ibid* at paras 5–6, 46, 49.

¹⁴⁰ *Ibid* at paras 6, 52.

¹⁴¹ *Ibid* at para 7.

¹⁴² *Ibid* at para 66.

¹⁴³ *Ibid* at paras 67, 75.

¹⁴⁴ *Ibid* at para 67.

¹⁴⁵ *Ibid* at para 75.

¹⁴⁶ *Ibid* at para 76.

¹⁴⁷ *Ibid* at paras 78, 94.

4. COMMENTARY

Kirk demonstrates the difficulty in bringing and succeeding in an environmental class action in Canada. In Canada, environmental class actions remain rare with only 71 having been brought between 2010 and 2022. Of those 71 cases, 49 were not certified, ten were certified but settled or dismissed, four are being appealed, three are awaiting a decision, and one was discontinued. The seven remaining cases are civil law actions in Quebec. Further, most of those cases arose from emissions standards and disclosures for automobiles rather than environmental spills similar to that considered in *Kirk*. Very few environmental, including climate change, class actions have been certified or proceeded to trial, especially in common law Canada where most are unsuccessful.¹⁴⁸

D. *COLES V. FCA CANADA INC.*¹⁴⁹

1. BACKGROUND

In *Coles*, the Ontario Superior Court of Justice was asked to determine if an action that seeks pure economic loss for dangerous airbags should be certified as a class action. In reaching its decision, the Court provided commentary about recent amendments to the Ontario *Class Proceedings Act, 1992*.¹⁵⁰

2. FACTS

In May 2015, the plaintiff, Gary Coles, sought to certify a class action against a car manufacturer, FCA Canada Inc. (FCA), for defective and dangerous airbags that were manufactured by Takata Corporation and TK Holdings (together, Takata).¹⁵¹

3. DECISION

The Ontario Superior Court of Justice dismissed the motion of Coles to certify the action.¹⁵² While the Court noted that Coles had otherwise proven each of the other four certification criteria, the Court concluded that a class action was not the preferable means of resolving the negligence claims against FCA.¹⁵³ In particular, the Court concluded that a class action was not preferable to an existing recall program of the Takata airbags being administered by FCA.¹⁵⁴

¹⁴⁸ Notably, see the first application for certification of an environmental class action to reach the Supreme Court of Canada in *Hollick v Toronto (City)*, 2001 SCC 68. See also *Sutherland v Canada (The Attorney General of)*, 1997 CanLII 2147 (BCSC); *Hoffman v Monsanto Canada Inc.*, 2007 SKCA 47; *Dow Chemical Company v Ring*, 2010 NLCA 20; *Bryson v Canada (AG)*, 2009 NBQB 204. See also Michael Molavi, “Access to Justice and the Limits of Environmental Class Actions in Ontario” (2020) 35:3 CJLS 391.

¹⁴⁹ 2022 ONSC 5575 [*Coles*].

¹⁵⁰ SO 1992, c 6 [ON CPA].

¹⁵¹ *Coles*, *supra* note 149 at paras 1–2, 57.

¹⁵² *Ibid* at paras 8, 173.

¹⁵³ *Ibid* at paras 7–8, 132, 140, 152, 172.

¹⁵⁴ *Ibid* at para 157.

While the Court noted that recent amendments made to the *Class Proceedings Act, 1992* did not apply to the Coles action, the Court provided some commentary about how the amendments might have affected the disposition of the certification motion.¹⁵⁵ The Court noted that the amendments to section 5(1.1) of the *Class Proceedings Act, 1992* introduced a “superiority” and a “predominance” qualification to the preferable procedure criterion.¹⁵⁶ The “superiority” and “predominance” qualification is also included in Rule 23 of the US *Federal Rules of Civil Procedure*.¹⁵⁷ The qualification enables a court to determine that a class action is the preferable means of advancing the claims of the class only if (1) the common issues predominate over individual ones and (2) a class action would be a superior means of advancing those claims over any available alternative.¹⁵⁸

4. COMMENTARY

The amendments to the *Class Proceedings Act, 1992*, as discussed in *Coles*, are the first comprehensive amendments to the *Class Proceedings Act, 1992* since its adoption more than 25 years ago. The most significant amendment is the introduction to the certification test of a preferable procedure threshold that adopts the predominance and superiority test in the US *Federal Rules of Civil Procedure*.

While the amended test signals a more onerous test for certification, there are a number of factors softening those new requirements. Among other things, class actions will still be assessed on the low “some basis in fact” standard (in other words, the plaintiff only has to show some reason to believe that the common issues may predominate over individual ones, rather than having to prove that they will).

That being said, if Ontario courts follow the experience in the US, it is likely that there will be a greater number of decisions refusing certification going forward.

IV. COMPETITION LAW

Canadian jurisprudence has made great strides in recent years when it comes to competition law. The Competition Tribunal (the Tribunal) has begun issuing its first decisions since the modernization of the *Competition Act*,¹⁵⁹ and the Tribunal has weighed in on important issues of Canadian merger law, including, among others, the Tribunal’s approach to product market definition and to what extent a transaction must lessen competition for the reduction to be considered “substantial.” The implications of these decisions ought to put energy lawyers across the country on notice.

¹⁵⁵ *Ibid* at para 156.

¹⁵⁶ *Ibid* at para 155; ON CPA, *supra* note 150, s 5(1.1).

¹⁵⁷ 37 CFR § 2.116 (2022), r 23(b)(3).

¹⁵⁸ ON CPA, *supra* note 150, s 5(1.1)(a)–(b).

¹⁵⁹ RSC 1985, c C-34.

A. *REBUCK V. FORD MOTOR COMPANY*¹⁶⁰

1. BACKGROUND

In *Rebuck*, the Ontario Superior Court of Justice found that compliance with federal manufacturing guidelines, along with literal truth, provided protection from liability for allegedly breaching provisions of the *Competition Act*.

2. FACTS

The plaintiff brought a class action against Ford Motor Company (Ford) over allegations that claims about the fuel efficiency of the brand's vehicles were false or misleading.

In 2013 and 2014, Ford sold vehicles with EnerGuide labels that specified expected fuel consumption levels for each vehicle. The labels also included various disclaimers, including statements that the fuel consumption estimates were based on the Canadian government's approved criteria and testing methods, that actual fuel consumption may differ from the estimates, that consumers should "Refer to the Fuel Consumption Guide," and that a copy of the Fuel Consumption Guide could be obtained from a dealer or by calling a specific number.¹⁶¹ The plaintiff sued under the misleading advertising provisions of the *Competition Act*¹⁶² and alleged that the estimates on these labels were false or misleading, raising claims that the method Ford used to create the estimates was generally inaccurate and tended to overestimate fuel efficiency.¹⁶³

3. DECISION

The Ontario Superior Court of Justice found that Ford had used a method approved by federal guidelines to determine its fuel consumption estimates, which meant that Ford could not be held liable for the results of using that method.¹⁶⁴ The Court also found that the plaintiff's claims that the labels were false or misleading could not be supported by the evidence. Section 52(4) requires courts to assess both the literal meaning and general impression conveyed by representations.¹⁶⁵ It was uncontested that the EnerGuide statements were true. Moreover, the Court found that, contrary to the plaintiff's arguments, the plaintiff failed to lead evidence to suggest that the general impression conveyed by the representations was false or misleading.¹⁶⁶

4. COMMENTARY

This decision confirms that representations made in compliance with federal guidelines will not automatically be considered unlawful or improper. It also demonstrates that evidence of how consumers might perceive the general impressions of a representation must be led for

¹⁶⁰ 2022 ONSC 2396 [*Rebuck*].

¹⁶¹ *Ibid* at paras 2, 7.

¹⁶² *Competition Act*, *supra* note 159, s 52.

¹⁶³ *Rebuck*, *supra* note 160 at paras 12–14.

¹⁶⁴ *Ibid* at para 48.

¹⁶⁵ *Competition Act*, *supra* note 159, s 52(4).

¹⁶⁶ *Rebuck*, *supra* note 160 at paras 53–64.

a court to be persuaded that a representation is false or misleading, assuming the literal meaning of that representation is true.

B. CANADA (COMMISSIONER OF COMPETITION) V. ROGERS COMMUNICATIONS INC. AND SHAW COMMUNICATIONS INC.¹⁶⁷ AND CANADA (COMMISSIONER OF COMPETITION) V. PARRISH & HEIMBECKER, LIMITED¹⁶⁸

1. BACKGROUND

Rogers and *Parrish* saw the Tribunal demonstrate its approach to mergers that may substantially reduce competition. The Tribunal ruled on multiple foundational Canadian merger law issues, such as the Tribunal’s approach to product market definition, the benchmark for determining whether a merger has “substantially” lessened competition, and the burden parties to a merger bear to prove claims of efficiencies.

2. FACTS

In *Rogers*, the Tribunal declined to block a proposed CDN\$26 billion amalgamation between Rogers Communications Inc. and Shaw Communications Inc. on the basis that the Commissioner of Competition (the Commissioner) had not adequately proven that a substantial prevention or lessening of competition would result from the transaction pursuant to the merger provisions of the *Competition Act*.¹⁶⁹ At the time of the Tribunal’s hearing, the transaction involved two steps — a divestiture of the entirety of Freedom Mobile Inc. (Freedom Mobile) to Vidéotron Ltd. (Vidéotron), followed by an amalgamation — which is the form the Tribunal considered, rather than the transaction’s original one-step form. The adequacy of the Freedom Mobile divestiture to Vidéotron was the only serious issue in the proceedings before the Tribunal. The Tribunal found that Vidéotron, as an experienced market player in Quebec, will be able to operate Freedom Mobile as an effective competitor and offer competitive bundled products.¹⁷⁰ The Tribunal determined Vidéotron’s entry into the wireless markets in western Canada would ensure that competition and innovation there remain unchanged.¹⁷¹ The Commissioner appealed to the Federal Court of Appeal.

In *Parrish*, Parrish & Heimbecker, Limited (Parrish) purchased a grain elevator in Manitoba, which the Commissioner argued had substantially lessened or would substantially lessen competition in the wheat and canola purchase markets in the area around the elevator.¹⁷² The Commissioner advised the Tribunal that defining the provision of intermediary services, such as grain handling services, as the relevant product market was more fitting in this case. He advocated that the Tribunal adopt the US Horizontal Merger Guidelines’ approach to relevant product market definition. The Guidelines’ approach contemplated that the benchmark price used for analyzing a product’s market could differ

¹⁶⁷ (31 December 2022), CT-2022-002, online: *Competition Tribunal* [perma.cc/E739-2F8L] [*Rogers*], aff’d 2023 FCA 16 [*Rogers Appeal*].

¹⁶⁸ (31 October 2022), CT-2019-005, online: *Competition Tribunal* [perma.cc/89P5-JVS8] [*Parrish*].

¹⁶⁹ *Rogers*, supra note 167 at paras 18, 404–405; *Competition Act*, supra note 159, s 92.

¹⁷⁰ *Rogers*, *ibid* at paras 2–5, 29, 407.

¹⁷¹ *Ibid* at para 408.

¹⁷² *Parrish*, supra note 168 at paras 1–2.

from the price where a company's specific value contributions could be identified reasonably clearly. This "value-added" approach, the Commissioner submitted, was more appropriate for the facts.¹⁷³

3. DECISION

The Federal Court of Appeal dismissed the Commissioner's appeal in *Rogers*, agreeing with the Tribunal that the Tribunal's consideration of the divestiture in analyzing the transaction's competitive effects was realistic.¹⁷⁴

In *Parrish*, the Tribunal dismissed the Commissioner's application and concluded that the Commissioner did not prove Parrish's acquisition of a grain elevator in Manitoba had substantially lessened or would substantially lessen competition in the relevant markets in the surrounding area.¹⁷⁵ The Tribunal rebuffed the Commissioner's arguments to apply the US Horizontal Merger Guidelines' approach to relevant product market definition. It held that the "value-added" approach failed on all fronts: "on the facts, from a precedential and legal standpoint, and from a conceptual and economic perspective."¹⁷⁶ The "value-added" approach had never been applied to facts similar to those in *Parrish*.¹⁷⁷

4. COMMENTARY

These two cases are important for energy lawyers to consider because they illustrate how the Competition Tribunal will assess mergers that potentially lessen competition. The Tribunal declined to block the transactions in both of these cases, disagreeing with the Competition Bureau's analysis and demonstrating that the Tribunal acts as a powerful independent check in Bureau challenges. *Rogers* in particular illustrates the importance of presenting evidence that a divestiture buyer will be effective. This is also consistent with the Bureau's own guidelines.

C. *DAVID V. LOBLAW*¹⁷⁸

1. BACKGROUND

In *Loblaw*, the Ontario Superior Court of Justice certified a class action alleging a long-running price-fixing conspiracy and commented on the liability of parent companies for the wrongdoings of subsidiaries.

2. FACTS

The plaintiff alleged that the defendants, Weston Bakeries, Loblaw, and certain other retailers and producers of packaged bread, participated in a price-fixing agreement relating

¹⁷³ *Ibid* at paras 214–21.

¹⁷⁴ *Rogers Appeal, supra* note 167 at paras 4, 10–12.

¹⁷⁵ *Parrish, supra* note 168 at para 7.

¹⁷⁶ *Ibid* at para 228.

¹⁷⁷ *Ibid* at para 290.

¹⁷⁸ 2021 ONSC 7331 [*Loblaw*].

to bread products over a number of years. This conspiracy, the plaintiff alleged, allowed the defendant packaged bread retailers to manipulate the market for 16 years, allowing them to reap \$5 billion in unjust profits.¹⁷⁹ The proposed class also included “umbrella purchasers,” or consumers who had purchased products on which the price fixing of bread had an indirect effect.¹⁸⁰

3. DECISION

The Ontario Superior Court of Justice authorized the proceeding but refused to certify it as against a number of the defendants’ parent companies in instances where the plaintiff did not establish a reasonable cause of action against those companies. The plaintiff argued that the parent companies controlled the subsidiaries. However, the Court noted that the plaintiff did not discuss any active steps that the parent companies took to move the alleged price-fixing agreement forward.¹⁸¹ The Court also refused to include “umbrella” claims that the alleged conspiracy also increased the price of other non-packaged bread products.¹⁸²

4. COMMENTARY

Energy lawyers who are providing advice to large clients should be aware of the key takeaway from this decision: a parent corporation whose subsidiary is engaged in wrongdoing will not automatically be liable for the subsidiary’s misconduct if the parent did not take actions that demonstrate there is no corporate separateness between the two entities.

V. CONTRACTUAL INTERPRETATION

The past year was not one for groundbreaking contractual interpretation cases from the Supreme Court of Canada in the vein of *Sattva*,¹⁸³ *Bhasin v. Hrynew*,¹⁸⁴ *CM Callow Inc. v. Zollinger*,¹⁸⁵ or *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*.¹⁸⁶ However, four cases were released by the Ontario Court of Appeal that provide meaningful guidance for energy lawyers. Those decisions concerned: the enforceability of unqualified representations and warranties; the continued availability of a claim of fraudulent misrepresentation in the face of an entire agreement clause and due diligence rights; the principles applicable to purchase price allocation where assets are subject to a Right of First Refusal; and the circumstances in which an expired agreement may be extended by conduct.

¹⁷⁹ *Ibid* at paras 2–3.

¹⁸⁰ *Ibid* at para 4.

¹⁸¹ *Ibid* at para 57.

¹⁸² *Ibid* at para 109.

¹⁸³ *Sattva*, *supra* note 30.

¹⁸⁴ 2014 SCC 71.

¹⁸⁵ 2020 SCC 45.

¹⁸⁶ 2021 SCC 7.

**A. *BOLIDEN MINERAL AB*
*v. FQM KEVITSA SWEDEN HOLDINGS AB*¹⁸⁷**

1. BACKGROUND

Boliden confirms that, where a party gives a representation about a state of affairs, the representation may be breached even if the representor did not know or reasonably expect that the representation was false at the time of closing. The contractual language selected by the parties in drafting the representations and warranties governs. If parties wish to limit representations to the representor's knowledge and belief at the time of closing, that must be made express in the contract.

2. FACTS

FQM Kevitsa Sweden Holdings (FQM) sold the shares of a Finnish mining company, Boliden Kevitsa Mining Oy (Kevitsa) to Boliden Mineral AB (Boliden). Pursuant to the share purchase agreement between FQM and Boliden (the SPA), which was governed by Ontario law, FQM provided representations and warranties regarding Kevitsa's pre-closing tax liabilities.¹⁸⁸ Specifically, FQM represented to Boliden that Kevitsa had correctly filed "all required tax returns which were 'complete and correct in all material respects', all taxes due and payable had been paid except for contested amounts disclosed and provided for in Kevitsa's financial statements, there was no audit underway or discussion ongoing with any tax authorities, and '[t]here are no grounds for the reassessment of the Taxes."¹⁸⁹

The SPA also contained an indemnity clause. It required FQM to indemnify Boliden and Kevitsa for "any 'Losses' arising from any breach or inaccuracy in the representations and warranties."¹⁹⁰ The SPA defined "Losses" to include all consequential and indirect losses that were reasonably foreseeable.¹⁹¹

The SPA closed on 1 June 2016. In 2017, Kevitsa was audited by Finnish tax authorities. The audit concluded that FQM had undertaken a reorganization in 2010 as a tax avoidance measure. A reassessment was issued by the Finnish tax authorities in 2018 that required Kevitsa to pay an additional €16 million comprising taxes, penalties, and interest accrued between 2012 and 2016. Boliden applied for an order seeking indemnification for the tax liabilities from FQM.¹⁹²

The motion judge held that FQM had breached the representation and warranty in the SPA. As a result, FQM was required to indemnify Boliden for the tax liabilities brought about by the reassessment for the years 2012 to 2016. The motion judge rejected FQM's evidence about what it actually knew or might reasonably have expected to know about the

¹⁸⁷ 2023 ONCA 105 [*Boliden*].

¹⁸⁸ *Ibid* at paras 1, 5.

¹⁸⁹ *Ibid* at para 6.

¹⁹⁰ *Ibid* at para 7.

¹⁹¹ *Ibid*.

¹⁹² *Ibid* at paras 5, 10–11, 13.

prospect of a reassessment as at closing on the basis that its representation and warranty was absolute and unconditional.¹⁹³

The motion judge also ordered FQM to indemnify Boliden for certain accumulated tax losses that were used to offset increased taxes due to the reassessment, leading to higher taxes in 2017 and 2018. The motion judge held that the loss of the accumulated tax losses “was a consequential or indirect loss that was a reasonably foreseeable consequence.”¹⁹⁴

The motion judge therefore ordered FQM to reimburse Boliden for all additional tax liabilities incurred between 2012 and 2018.¹⁹⁵ FQM appealed the order to the Ontario Court of Appeal.

3. DECISION

On appeal, FQM argued that the representation and warranty was true at the time that it was given and that the reassessment arose due to a post-closing reinterpretation of Finnish tax legislation. FQM submitted that a representation and warranty is only required to be true on the date it is made. A breach of a representation and warranty is not actionable simply because, in light of a subsequent event, it is no longer true.¹⁹⁶

The Ontario Court of Appeal rejected FQM’s submissions. The SPA stated that all representations and warranties were required to be true and correct at the time of closing. While certain representations and warranties in the SPA were limited to the knowledge of FQM, the representation and warranty related to tax reassessment was not.¹⁹⁷

The Court held that the representation and warranty was untrue at the time of closing even if the prospect of the reassessment “was neither known to or reasonably expected by FQM ... and only became apparent later.”¹⁹⁸ Even though the grounds for the reassessment only became apparent later, they existed at the time of closing.¹⁹⁹ The Court therefore dismissed FQM’s appeal.

4. COMMENTARY

Representations and warranties are an essential and heavily negotiated part of any transaction. If a party is concerned that a future contingency may render a representation and warranty false, it is critically important to include qualifying language that the representation and warranty is limited to the knowledge of the vendor at the time of closing. Such qualifications are of particular importance in representations and warranties related to tax liabilities, which may be subject to reassessment after closing.

¹⁹³ *Ibid* at para 16.

¹⁹⁴ *Ibid* at para 17.

¹⁹⁵ *Ibid* at para 19.

¹⁹⁶ *Ibid* at paras 24–25.

¹⁹⁷ *Ibid* at para 26.

¹⁹⁸ *Ibid*.

¹⁹⁹ *Ibid* at para 27.

If a party agrees to provide a representation about a state of affairs without qualifying language about the representor's knowledge, and the state of affairs changes subsequent to the representation, it will not be a defence for the representor to state that it did not know or reasonably expect that the representation and warranty was false at the time of closing.

B. 10443204 CANADA INC. V. 2701835 ONTARIO INC.²⁰⁰

1. BACKGROUND

10443204 Canada confirms that the inclusion of an entire agreement clause and due diligence rights in an agreement do not preclude a claim of fraudulent misrepresentation. Even if parties are sophisticated and have equal bargaining power, they cannot contract out of a fraudulent misrepresentation claim.

2. FACTS

2701835 Ontario Inc. (Purchaser) entered into a purchase and sale agreement with 10443204 Canada Inc. (Vendor) related to a coin laundry business (the Agreement).²⁰¹ The Agreement contained a standard entire agreement clause, stating that “[t]here is no representation, warranty, collateral agreement or condition, affecting this Agreement other than as expressed herein.”²⁰² The Agreement also provided a right to the Purchaser to attend the business and conduct due diligence to verify the income of the business.²⁰³

The Vendor commenced an action alleging that the Purchaser was in default under a payment plan that had been put in place pursuant to the Agreement and sought the balance of the purchase price. The Purchaser defended and counterclaimed on the basis that it had been induced to enter into the Agreement by the Vendor's fraudulent or negligent misrepresentations about the gross revenues of the business.²⁰⁴

The Vendor brought a motion for summary judgment on the basis that the Purchaser's claim of fraudulent or negligent misrepresentation did not give rise to a genuine issue for trial. That motion was successful.²⁰⁵

In granting judgment for the Vendor, the motion judge noted the prior decision of the Ontario Court of Appeal in *Royal Bank of Canada v. 1643937 Ontario Inc.*, which held that a defence of misrepresentation is not precluded by an entire agreement clause.²⁰⁶ The motion judge distinguished *Royal Bank* on the basis that there had been unequal bargaining power in that case that was not present between the Purchaser and Vendor. The motion judge also relied heavily on the fact that the Agreement afforded the Purchaser the right to conduct due diligence about the income generated by the business prior to closing.²⁰⁷

²⁰⁰ 2022 ONCA 745 [*10443204 Canada*].

²⁰¹ *Ibid* at para 5.

²⁰² *Ibid* at para 6.

²⁰³ *Ibid* at para 7.

²⁰⁴ *Ibid* at paras 9–10.

²⁰⁵ *Ibid* at paras 15–18.

²⁰⁶ *Ibid* at para 16; *Royal Bank of Canada v 1643937 Ontario Inc.*, 2021 ONCA 98.

²⁰⁷ *10443204 Canada*, *ibid* at paras 16–17.

The Purchaser appealed the decision granting summary judgment to the Ontario Court of Appeal.

3. DECISION

The Ontario Court of Appeal granted the appeal and held that the motion judge erred in finding that the Purchaser's defence of fraudulent misrepresentation was precluded by the entire agreement clause. The Court of Appeal held the entire agreement clause could not invalidate the defence of fraudulent misrepresentation because fraudulent misrepresentation, if established, will result in the contract at issue being avoided or rescinded.²⁰⁸

The Court also held that the motion judge erred in distinguishing *Royal Bank* as “[t]he policy of the law to discourage fraud is applicable to cases of equal and unequal bargaining power.”²⁰⁹

The Court also held that the availability of due diligence rights did not deprive the Purchaser of its right to avoid the contract based on fraudulent misrepresentation.²¹⁰ Actual knowledge of the untruth of a representation is a bar to a claim of fraudulent misrepresentation. However, the mere fact that a party has an opportunity to verify that a representation is untrue does not deprive that party of its right to void a contract based on an undetected fraudulent misrepresentation.²¹¹

Ultimately, the Court affirmed that, as none of these factors can preclude a defence of fraudulent misrepresentation on their own, the motion judge erred in determining that together they worked to deprive the Purchaser of its fraudulent misrepresentation defence.²¹²

4. COMMENTARY

Entire agreement clauses and due diligence rights are important elements of any sophisticated commercial transaction. While they provide many meaningful protections to the parties to a transaction, neither an entire agreement clause nor a broad due diligence right can preclude a purchaser from advancing a fraudulent misrepresentation claim.

Distilled to its basic principle, *10443204 Canada* confirms that parties cannot contract out of a fraudulent misrepresentation claim. Such a claim goes to the validity of the contract and cannot be precluded by anything in the contract. It therefore remains critical that parties exercise care about the representations that they make during negotiations to avoid a potential misrepresentation claim. Parties cannot rely on their relative bargaining power or the fact that they have bargained for an entire agreement clause or provided their counterparties with broad due diligence rights to avoid such a claim.

²⁰⁸ *Ibid* at paras 20–23.

²⁰⁹ *Ibid* at para 28.

²¹⁰ *Ibid* at para 31.

²¹¹ *Ibid*.

²¹² *Ibid* at paras 32–33.

C. *GRETA ENERGY INC. V. PEMBINA PIPELINE CORPORATION*²¹³

1. BACKGROUND

Greta Energy provides important guidance about the principles applicable where assets are marketed en bloc and then later subject to a purchase price allocation for the purposes of issuing Right of First Refusal (ROFR) notices. The Ontario Court of Appeal provides clarity about the applicability of the evolving duty of good faith and confirms that it is not wrongful for vendors and purchasers to act in their own best interests in the circumstances.

2. FACTS

Veresen Energy Infrastructure Inc. (Veresen)²¹⁴ owned majority interests in three wind farms (GV1, GV2, and St. Columban). Two of those wind farms (GV1 and GV2) were owned through limited partnerships with Greta Energy Inc. (Greta) and Great Grand Valley 2 Limited Partnership (GG2). Both GV1 and GV2 were subject to ROFR clauses in the event that Veresen sold its interest.

In August 2016, Veresen announced its intention to sell the wind farms and several other assets en bloc.²¹⁵ BluEarth Renewables Inc. (BluEarth) submitted a bid in January 2017 for the Veresen assets, including the wind farms. Veresen advised BluEarth that its bid was successful and the parties negotiated a form of purchase and sale agreement (the PSA).²¹⁶

BluEarth provided Veresen with a preliminary and then final allocation of the purchase price for each of the three wind farms. The final version of the PSA was signed on 18 February 2017, and ROFR notices were sent to Greta and GG2 on 23 February 2017.²¹⁷ Greta and GG2 exercised the ROFR on GV2 but waived the ROFR on GV1.²¹⁸

Greta and GG2 then commenced an action against Veresen and BluEarth alleging that they had “conspired to manipulate the price of the assets being sold by Veresen in a bad faith attempt to prevent [Greta and GG2] from exercising their ROFRs.”²¹⁹ The plaintiffs further alleged that Veresen and BluEarth had knowingly misled them, in breach of the duty of good faith, and also advanced claims of conspiracy, breach of fiduciary duty, and inducing breach of contract.²²⁰

The defendants applied for and obtained summary dismissal of the action. In dismissing the action, the motion judge found that “the respondents acted in their self-interest and did not act improperly in doing so.”²²¹ “Veresen set up a legitimate process to sell its assets and BluEarth engaged in that process. Further, it was not commercially unreasonable for

²¹³ 2022 ONCA 783 [*Greta Energy*].

²¹⁴ *Ibid* at paras 6–7. Veresen was, after the events in issue, acquired by Pembina Pipeline Corporation.

²¹⁵ *Ibid* at para 8.

²¹⁶ *Ibid*.

²¹⁷ *Ibid* at para 9.

²¹⁸ *Ibid* at para 10.

²¹⁹ *Ibid* at para 12.

²²⁰ *Ibid*.

²²¹ *Ibid* at para 2.

BluEarth to pay a price for any or all of the assets that would pressure the ROFR holder not to exercise its rights.”²²²

The motion judge found that the duty of good faith applied in the circumstances, and that “Veresen was required to act in good faith towards the ROFR holders when it solicited offers, accepted them, and negotiated the terms of sale.”²²³ However, that duty was not breached.

First, it was not unfair to require bidders to bid for the *en bloc* package and to defer pricing allocation until the bidding process concluded. Second, Veresen did not encourage BluEarth to inflate the price of GV2 and had no obligation to object to any proposed reallocations. Third, Veresen did not take any steps to dissuade Greta or GG2 from exercising their ROFRs.²²⁴

The motion judge found that Veresen did not owe a fiduciary duty to the ROFR holders. While the PSA allowed Veresen to reject unreasonably low price allocations, that clause was for its own benefit. It had not impliedly or expressly undertaken to act in the best interests of the ROFR holders.²²⁵ The motion judge also rejected the plaintiffs’ conspiracy claim on the basis that it was unsupported by evidence.²²⁶

Finally, the motion judge rejected the plaintiff’s claim against BluEarth for inducing breach of contract on the basis that “BluEarth did not owe a duty of good faith to Greta and GG2 and was entitled to act in its own self-interest.”²²⁷ There was nothing improper about BluEarth “having a bid strategy that could discourage the exercise of a ROFR so long as the strategy was not unreasonable.”²²⁸

The plaintiffs appealed the summary dismissal of their Action to the Ontario Court of Appeal.

3. DECISION

The Ontario Court of Appeal unanimously upheld the motion judge’s ruling on all grounds. In doing so, the Court of Appeal commented favourably on the motion judge’s findings related to the duty of good faith. Among other things, the Court accepted the finding that there is no “correct” price for a ROFR — “there [is] only what the vendor offered and the purchaser [is] willing to accept. Thus, fair market value was not determinative of whether the respondent Veresen acted in good faith.”²²⁹

²²² *Ibid* at para 13.

²²³ *Ibid* at para 14.

²²⁴ *Ibid*.

²²⁵ *Ibid* at para 15.

²²⁶ *Ibid* at para 16.

²²⁷ *Ibid* at para 17.

²²⁸ *Ibid*.

²²⁹ *Ibid* at para 25.

The Court also commented favourably on the motion judge's finding that the dynamic between a ROFR holder and a third party is a competitive one, and that BluEarth was entitled to price the assets in a manner intended to discourage the exercise of the ROFR.²³⁰

4. COMMENTARY

ROFRs are a common source of disputes in the energy industry. *Greta Energy* provides helpful clarity about the legal principles, including the continuously evolving law related to the duty of good faith applicable to ROFRs, particularly where assets are sold en bloc and then subject to purchase price allocation.

Vendors and purchasers can take comfort in the Ontario Court of Appeal's findings related to breach of contract and the duty of good faith. In particular, the Court of Appeal recognized that there is a competitive process between purchasers and ROFR holders, and that it is not improper for a purchaser to price assets in a manner that discourages the exercise of a ROFR notice. However, this decision leaves the door open to liability in future cases if a bid strategy by a purchaser is held to be commercially unreasonable, or if a vendor and purchaser conspire to frustrate or circumvent a ROFR.

D. *COFFEE TIME DONUTS INCORPORATED* *v. 2197938 ONTARIO INC.*²³¹

1. BACKGROUND

This case confirms that fixed term contracts can be extended by the parties' conduct after the written term has expired.

2. FACTS

On 31 July 2009, 2197938 Ontario Inc. and Tirath Gill (the Appellants) entered into a franchise agreement (the Agreement) with Coffee Time Donuts Inc. (Coffee Time). Pursuant to the Agreement, the Appellants were to pay Coffee Time royalties in exchange for the right to purchase products from Coffee Time's exclusive suppliers and use Coffee Time's branding.²³²

The written term of the Agreement expired on 31 July 2014. However, the Appellants remained in operation pursuant to the terms of the Agreement. Between 31 July 2014, and 16 February 2016, the Appellants continued to pay royalties to Coffee Time, purchase products from exclusive suppliers, and operate under Coffee Time branding, all as provided for in the Agreement. Commencing on 16 February 2016, the Appellants ceased paying royalties to Coffee Time, notwithstanding that they continued to purchase products from exclusive suppliers and operate under Coffee Time branding.²³³

²³⁰ *Ibid* at paras 29, 32.

²³¹ 2022 ONCA 435 [*Coffee Time*].

²³² *Ibid* at para 2.

²³³ *Ibid*.

Coffee Time brought an action against the Appellants for unpaid royalties on the basis that the parties had extended the Agreement by their conduct after the expiry of its written term on a month-to-month basis.²³⁴ Coffee Time sought summary judgment of its claim.

The motion judge found that the Agreement was continued after the expiration of the written term on 31 July 2014, by the conduct of the parties. The motion judge relied on the fact that the Appellants had continued to pay royalties up to 16 February 2016, and had continued to use Coffee Time's branding and to purchase products from exclusive suppliers even after they ceased paying royalties to Coffee Time.²³⁵

3. DECISION

On appeal, the Ontario Court of Appeal upheld the motion judge's finding that the Agreement had been extended by the conduct of both parties. In coming to that conclusion, the Court of Appeal relied upon *Saint John Tug Boat Co. Ltd. v. Irving Refining Ltd.*,²³⁶ wherein the Supreme Court of Canada held that conduct, unaccompanied by any verbal or written undertaking, can constitute acceptance of an offer so as to create a binding contract or, as in this case, extend a contract.²³⁷

4. COMMENTARY

Coffee Time provides a helpful reminder that the conduct of parties following the expiry of an agreement may be construed by the courts as creating an extension of that agreement. The Appellant in this case was arguably trying to game the system by obtaining contractual benefits without having to pay for them. However, the decision also creates a risk that companies may be faced with attempts to foist contract extensions on them through conduct. For instance, a contractor may continue to provide services after its contract has expired in the hopes of extending its entitlement to payment for those services. It is therefore important to exercise careful contract management and to avoid engaging in any conduct that could be interpreted as an implicit acceptance of an extension.

VI. CYBERSECURITY

In 2022, the Ontario Court of Appeal clarified the scope of the tort of intrusion upon seclusion first established in *Jones v. Tsige*.²³⁸ In a trilogy of decisions, the Court of Appeal confirmed that the tort of intrusion upon seclusion does not apply to defendants who, for commercial purposes, collect and store the personal information of others (a Hacked Defendant) and fail to prevent a privacy breach by an outside party.

²³⁴ *Ibid* at paras 3, 8.

²³⁵ *Ibid* at para 5.

²³⁶ [1964] SCR 614.

²³⁷ *Ibid* at 621–22; *Coffee Time*, *supra* note 231 at para 7.

²³⁸ 2012 ONCA 32 [*Jones*].

A. CASES ABOUT THE TORT OF INTRUSION UPON SECLUSION

1. BACKGROUND

The Ontario Court of Appeal discussed intrusion upon seclusion in three decisions: (1) *Owsianik v. Equifax Canada Co.*,²³⁹ (2) *Obodo v. Trans Union of Canada, Inc.*,²⁴⁰ and (3) *Winder v. Marriott International, Inc.*²⁴¹ In *Owsianik*, the Court of Appeal held that only actual intruders can be liable for intrusion upon seclusion.²⁴² The *Obodo* decision meanwhile confirmed that Hacked Defendants will not be vicariously liable for such an intrusion absent a relationship with the tortfeasor such as an employer-employee relationship.²⁴³ Finally, the *Marriott* decision rejected the concept of a “constructive intruder” for the purposes of intrusion upon seclusion.²⁴⁴

2. DECISIONS

In *Owsianik*, *Obodo*, and *Marriott*, the appellants had unsuccessfully sought class action certification against the respective Hacked Defendants for a claim of intrusion upon seclusion.²⁴⁵ In each case, the Hacked Defendant had been hacked by an unknown third party. As a result, the proposed class members’ private information was made available to malicious third parties who could use this information for nefarious purposes. All three plaintiffs appealed their certification decisions.

In *Owsianik*, the Ontario Court of Appeal revisited the three proposed elements of the novel tort of intrusion upon seclusion:

- [T]he defendant must have invaded or intruded upon the plaintiff’s private affairs or concerns, without lawful excuse (the conduct requirement);
- the conduct which constitutes the intrusion or invasion must have been done intentionally or recklessly (the state of mind requirement); and
- a reasonable person would regard the invasion of privacy as highly offensive, causing distress, humiliation or anguish (the consequence requirement).²⁴⁶

In *Owsianik*, the appellant pled that the Hacked Defendant’s alleged intrusion occurred when it failed to take steps to prevent independent hackers from conduct that clearly invaded the proposed class members’ privacy interests.²⁴⁷ However, the Court of Appeal held that the Hacked Defendant itself did not interfere with those privacy interests.²⁴⁸ The Hacked Defendant had not conducted itself in a manner constituting an intrusion, and no one acting

²³⁹ 2022 ONCA 813 [*Owsianik*].

²⁴⁰ 2022 ONCA 814 [*Obodo*].

²⁴¹ 2022 ONCA 815 [*Marriott*].

²⁴² *Owsianik*, *supra* note 239 at para 61.

²⁴³ *Obodo*, *supra* note 240 at paras 24–26.

²⁴⁴ *Marriott*, *supra* note 241 at paras 16, 21–22.

²⁴⁵ *Ibid* at para 1; *Obodo*, *supra* note 240 at paras 1–2; *Owsianik*, *supra* note 239 at para 2.

²⁴⁶ *Owsianik*, *ibid* at para 54.

²⁴⁷ *Ibid* at para 57.

²⁴⁸ *Ibid*.

on its behalf or in consort with the Hacked Defendant had done so either.²⁴⁹ Its fault, if any, lay in its failure to protect the plaintiffs' privacy interests in negligence, contract, and under various statutes.²⁵⁰ Such failure "cannot, however, be transformed by the actions of independent third-party hackers into an invasion by the [Hacked Defendants] of the plaintiffs' privacy."²⁵¹ "Negligence cannot morph or be transformed into an intentional tort."²⁵² Accordingly, the Court dismissed the *Owsianik* appeal.

In *Obodo*, the appellant argued that the *Obodo* Hacked Defendant had "enabled and facilitated" a third party hacker's access to class members' private information by having inadequate protective measures that fell below industry standards.²⁵³ The appellant also argued that several class actions were certified on the basis that the intruder was an employee of the defendant, and submitted that "it would be anomalous if a Defendant could be found liable for enabling an intrusion if it was the employer of the intruder, but not if the intruder was unknown to it."²⁵⁴

The Court reiterated its decision in *Owsianik* and rejected the appellant's novel argument. There was no allegation that the Hacked Defendant and the unknown hacker were co-conspirators, acted in concert, or acted in pursuit of a common unlawful goal.²⁵⁵ Rather, the hacker gained access to the information stored by the Hacked Defendant by stealing information from one of the Hacked Defendant's customers.²⁵⁶ "Absent a properly pleaded allegation of conspiracy or common enterprise, [the Hacked Defendant] could only be liable for intrusion upon seclusion . . . [if it were] somehow vicariously liable for the actions of the [third party] hacker."²⁵⁷ The Court refused to impose the equivalent of vicarious liability to the Hacked Defendant absent an employer-employee relationship between it and the actual intruder.²⁵⁸ The Court further noted that the Hacked Defendant remained liable "for any damages flowing from its negligence, or from breaches of any contractual, or statutory duties potentially owing to [the appellant] and the other class members."²⁵⁹ The Court dismissed the *Obodo* appeal.

In the *Marriott* appeal, the appellant claimed that the Hacked Defendant "invaded the privacy of its customers when it collected and stored their personal information in a manner that did not reflect the representations [the Hacked Defendant] had made to its customers and that did not meet [its] legal obligations in respect of maintaining the security of the information."²⁶⁰ The appellant alleged the Hacked Defendant had invaded the privacy of its customers regardless of whether any third party actually gained access to the customers' information.²⁶¹ The *Marriott* appellant essentially argued that the Hacked Defendant was a

²⁴⁹ *Ibid* at para 64.

²⁵⁰ *Ibid* at para 61.

²⁵¹ *Ibid* at para 8.

²⁵² *Ibid* at para 71.

²⁵³ *Obodo*, *supra* note 240 at paras 9–10.

²⁵⁴ *Ibid* at para 21.

²⁵⁵ *Ibid* at para 22.

²⁵⁶ *Ibid*.

²⁵⁷ *Ibid* at para 23.

²⁵⁸ *Ibid* at para 26.

²⁵⁹ *Ibid*.

²⁶⁰ *Marriott*, *supra* note 241 at para 6.

²⁶¹ *Ibid*.

“constructive intruder.”²⁶² The motion judge held that the tort of intrusion upon seclusion did not extend to “constructive intruders,” only actual intruders.²⁶³

On appeal, the Ontario Court of Appeal rejected the “constructive intruder” argument. It held that the material facts pled were the same facts said to support the appellant’s claims against the Hacked Defendant based on negligence, breach of contract, and failure to comply with statutory obligations.²⁶⁴ “There [was] no allegation that [the Hacked Defendant] accumulated, stored or used the personal information provided by its customers for any purpose other than the purposes reasonably contemplated by the customers.”²⁶⁵ The Hacked Defendant’s alleged misconduct lay in its failure to safeguard its customers’ privacy rights from intrusion by others, not in the Hacked Defendant itself breaching its customers’ privacy rights.²⁶⁶ The appellant’s argument ignored the rationale behind *Jones*,²⁶⁷ “[p]ersons are entitled to decide for themselves when, how, and to what extent” they will disclose their personal information to others.²⁶⁸ The Hacked Defendant’s customers had agreed to disclose personal information to it for operational purposes. There were no facts pled that the Hacked Defendant used or disclosed that information for any other purpose than as represented. Accordingly, there was no breach of the customers’ privacy rights until the hackers acted.²⁶⁹ The Court of Appeal dismissed the *Marriott* appeal.

3. COMMENTARY

The Ontario Court of Appeal refined the scope of the tort of intrusion upon seclusion in several ways which all limit the application of the tort to cases where the defendant itself deliberately invades the plaintiff’s privacy. Absent a common enterprise, conspiracy, or other joint conduct, a Hacked Defendant cannot be held liable for the actions of a third party hacker. Furthermore, vicarious liability will not be imposed on Hacked Defendants absent a relationship between the actual intruder and the Hacked Defendant, such as an employer-employee relationship. Finally, merely failing to maintain the security of private information is not sufficient to make out the tort of intrusion upon seclusion.

VII. EMPLOYMENT AND LABOUR

During the past year, many employers dealt with the challenges caused by the COVID-19 pandemic. Employers remained engaged in ongoing claims related to policies implemented as a response to the pandemic, including cost reduction programs and mandatory vaccination policies. Those claims wound their way through the courts, with some notable decisions released over the year.

²⁶² *Ibid* at para 16.

²⁶³ *Ibid*.

²⁶⁴ *Ibid* at para 19.

²⁶⁵ *Ibid* at para 20.

²⁶⁶ *Ibid*.

²⁶⁷ *Jones*, *supra* note 238 at paras 39–41.

²⁶⁸ *Marriott*, *supra* note 241 at para 21.

²⁶⁹ *Ibid*.

The *Parmar v. Tribe Management Inc.*²⁷⁰ case from the British Columbia Supreme Court was particularly significant. The Court held that placing an unvaccinated employee on unpaid leave under the employer's mandatory vaccination policy did not constitute constructive dismissal. This decision granted welcome certainty to the many employers who initiated mandatory vaccination policies in response to the pandemic. Beyond COVID-19 issues, the Alberta Court of Appeal also released two decisions that dealt with recurring issues in employment disputes. In *Kosteckyj v. Paramount Resources Ltd.*,²⁷¹ the Alberta Court of Appeal specified that employees only have a reasonable, and quite short, period of time to object to a change of employment terms and claim constructive dismissal.

A. *PARMAR V. TRIBE MANAGEMENT INC.*

1. BACKGROUND

In *Parmar*, the British Columbia Supreme Court upheld a mandatory vaccination policy enacted by an employer. The Court dismissed a claim for constructive dismissal brought by an employee who had been placed on unpaid leave for non-compliance with the vaccination policy.

2. FACTS

On 5 October 2021, Tribe Management Inc. (Tribe) implemented a mandatory vaccination policy in response to the COVID-19 pandemic. The stated purpose of the policy was to protect the health and safety of Tribe's staff, their families, and the community more generally.²⁷² The policy provided for medical or religious exemptions.²⁷³ Employees who did not wish to be vaccinated (absent any valid medical or religious exemption) were accommodated by being placed on an unpaid leave of absence rather than being dismissed or disciplined.²⁷⁴

The policy required all employees to be fully vaccinated by 24 November 2021. By that date, only two employees out of approximately 200 remained unvaccinated. Those employees were placed on an unpaid leave of absence for a three-month period, subject to review.²⁷⁵

Deepak Parmar was one of those two employees. She did not assert a medical or religious basis for an exemption but raised certain concerns about the effectiveness and potential risks of the vaccine. Parmar was placed on unpaid leave, which was ultimately made indefinite. She resigned two months after being placed on leave, alleging that she had been constructively dismissed.²⁷⁶ Parmar claimed that "Tribe fundamentally breached its

²⁷⁰ 2022 BCSC 1675 [*Parmar*].

²⁷¹ 2022 ABCA 230 [*Kosteckyj*].

²⁷² *Parmar*, *supra* note 270 at paras 52–54.

²⁷³ *Ibid* at para 56.

²⁷⁴ *Ibid* at para 68.

²⁷⁵ *Ibid* at paras 55, 57, 78–81.

²⁷⁶ *Ibid* at paras 60–67, 85–86.

contractual obligations, entitling her to treat the employment relationship as having ended.”²⁷⁷

Tribe maintained that its mandatory vaccination policy was a reasonable and lawful response to the COVID-19 pandemic and that it was justified in placing Parmar on an unpaid leave of absence for failing to comply with the policy.²⁷⁸

3. DECISION

The British Columbia Supreme Court dismissed Parmar’s claim for constructive dismissal.²⁷⁹ The case largely turned on “whether Tribe had *bona fide* business reasons, including safety reasons, for the [mandatory vaccination policy] and for placing Ms. Parmar on an unpaid leave of absence for failing to comply with it.”²⁸⁰ The Court held that the policy did not need to be perfect. It simply needed to constitute a reasonable approach when implemented.²⁸¹

The Court ultimately determined that Tribe’s mandatory vaccination policy was “a reasonable and lawful response to the uncertainty created by the COVID-19 pandemic based on the information available” to Tribe at the time.²⁸² In coming to that conclusion, the Court noted that the policy allowed for both medical and religious exemptions.²⁸³ It also noted that the policy “struck an appropriate balance between Tribe’s business interests, the rights of its employees to a safe work environment, its clients’ interests, and the interests of the residents” in the buildings to which Tribe provided property management services.²⁸⁴ The policy permitted employees such as Parmar to maintain their refusal to be vaccinated without losing their employment by placing them on unpaid leave.²⁸⁵

The Court held that Parmar understood that she would be placed on an unpaid leave of absence as a consequence of her decision to remain unvaccinated.²⁸⁶ Her decision to instead resign from her employment with Tribe was a voluntary decision.²⁸⁷ Parmar was entitled to her beliefs about COVID-19 vaccination, but her beliefs did not entitle her to an exception to Tribe’s mandatory vaccination policy.²⁸⁸

Accordingly, the Court held that Parmar had not been constructively dismissed by being placed on leave. Any lost income that Parmar may have suffered from being placed on unpaid leave and subsequently resigning her position was as a result of her personal choice not to comply with Tribe’s reasonable and lawful policy.²⁸⁹

²⁷⁷ *Ibid* at para 3.

²⁷⁸ *Ibid* at para 4.

²⁷⁹ *Ibid* at para 157.

²⁸⁰ *Ibid* at para 99.

²⁸¹ *Ibid*.

²⁸² *Ibid* at para 134.

²⁸³ *Ibid* at para 135.

²⁸⁴ *Ibid* at para 137.

²⁸⁵ *Ibid*.

²⁸⁶ *Ibid* at para 139.

²⁸⁷ *Ibid* at para 140.

²⁸⁸ *Ibid* at paras 144–45.

²⁸⁹ *Ibid* at para 152.

4. COMMENTARY

Parmar is one of the first decisions to meaningfully consider the issues related to mandatory vaccination policies in non-unionized workplaces. It provides certainty to employers that have introduced mandatory vaccination policies in response to the COVID-19 pandemic and that are now facing challenges to those policies in the courts.

This case will provide a helpful roadmap for litigants and the courts in dealing with other claims related to mandatory vaccination policies that are currently working their way through the Canadian justice system. As was done in this case, courts are likely to assess the reasonableness of mandatory vaccination policies by reviewing factors such as whether the employer had bona fide business reasons for implementing the policy, whether the policy allowed for religious and medical exemptions, and whether the policy was consistent with the state of knowledge about COVID-19 at the time that it was implemented.

B. *KOSTECKYJ V. PARAMOUNT RESOURCES LTD.*

1. BACKGROUND

Kosteckyj confirms that a substantial change to an employee's terms of employment is not enough on its own to constitute constructive dismissal. The employee must also decline to accept the new terms of employment within a reasonable period of time, in this case within 25 days. Failure to object within a reasonable period of time constitutes acceptance of the new terms of employment and will disentitle an employee from advancing a constructive dismissal claim.

2. FACTS

Olga Kosteckyj was employed as a senior integrity engineer with Paramount Resources Ltd. (Paramount), a publicly traded energy company.²⁹⁰ On 27 March 2020, Paramount announced that it would be implementing a new cost reduction program throughout the company, effective on 1 April 2020. The cost reduction program included across-the-board reductions of salaries and benefits. For Kosteckyj, this meant a 10 percent salary reduction, suspension of employer RRSP contributions, a delay to or cancellation of her bonus, and no access to seminars or training.²⁹¹ On 22 April 2020, in an attempt to further reduce costs, Paramount terminated a number of employees without cause, including Kosteckyj.²⁹²

Kosteckyj brought an action against Paramount seeking damages for wrongful dismissal and applied to have her claim determined by summary trial.²⁹³ In her summary trial brief, she alleged that Paramount had constructively dismissed her when the cost reduction program was implemented on 1 April 2020.²⁹⁴

²⁹⁰ *Kosteckyj*, *supra* note 271 at paras 18–20.

²⁹¹ *Ibid* at para 21.

²⁹² *Ibid* at para 22.

²⁹³ *Ibid* at paras 23–24.

²⁹⁴ *Ibid* at para 25.

Paramount argued that Kosteckyj could not claim to have been constructively dismissed on 1 April 2020, given that she was terminated three weeks later on 22 April 2020.²⁹⁵ The chambers judge held that Kosteckyj had, in fact, been constructively dismissed. The chambers judge determined that the cost reduction program amounted to “a change to and breach of her employment contract and Ms. Kosteckyj had no obligation to decide whether this change was a repudiation of the contract in the twenty-five days between when she was informed of the program and her termination.”²⁹⁶ Paramount appealed the decision.

3. DECISION

The Alberta Court of Appeal agreed with the chambers judge that the changes to Kosteckyj’s employment terms resulting from the cost reduction program constituted a substantial change to an essential obligation in the employment contract.²⁹⁷ However, the Court held that the chambers judge erred in finding that Kosteckyj did not accept or acquiesce to those new terms of employment.²⁹⁸

The Court of Appeal noted that Kosteckyj never stated that she refused to accept the changes Paramount introduced on 1 April 2020.²⁹⁹ Further, there was no evidence that Kosteckyj had taken any steps to communicate with Paramount about the changes or express her dissatisfaction to Paramount prior to 22 April 2020, when her employment was terminated.³⁰⁰ The fact that Kosteckyj continued to work for three weeks doing the same tasks from the same office was held to be clear evidence that she had in fact accepted the reduced level of compensation.³⁰¹

The Court held that the 25-day period between the implementation of the cost reduction plan and Kosteckyj’s termination was “a sufficient period of time for Ms Kosteckyj to decide whether she would accept Paramount’s changes to her employment contract, or to leave her employment and claim constructive dismissal.”³⁰²

In his reasons, Justice Wakeling suggested that a bright-line rule should be adopted by the Court regarding the length of time in which an employee must accept or reject the new employment terms. Justice Wakeling held that, in light of Kosteckyj’s personal circumstances, the reasonable period of time available to Kosteckyj to challenge the new terms of employment was no more than ten business days.³⁰³ He noted that a different employee may require more than ten days to consider all of the information needed to make an informed decision, but that “it would be a rare case that a reasonable period would exceed fifteen business days.”³⁰⁴

²⁹⁵ *Ibid* at para 26.

²⁹⁶ *Ibid* at para 33.

²⁹⁷ *Ibid* at para 54.

²⁹⁸ *Ibid* at para 56.

²⁹⁹ *Ibid* at para 15.

³⁰⁰ *Ibid* at para 79.

³⁰¹ *Ibid* at paras 58, 81.

³⁰² *Ibid* at para 82.

³⁰³ *Ibid* at para 59.

³⁰⁴ *Ibid* at para 60.

4. COMMENTARY

After the onset of the COVID-19 pandemic, and the collapse in oil and gas prices, many employers in the energy industry enacted cost reduction measures. Legal challenges related to those measures continue to work their way through the justice system. In *Kosteckyj*, the Alberta Court of Appeal confirmed that even broadly implemented cost reduction measures can constitute constructive dismissal. However, only employees who reject or object to the new terms of employment within a reasonable period of time will be able to advance claims for constructive dismissal.

In this case, the reasonable period of time was quite short — between ten and 25 days. However, what constitutes a reasonable period of time for an employee to object to substantial changes to terms of employment is a fact-specific analysis which may vary depending on the personal circumstances of a particular employee.

Justice Wakeling attempted to establish a bright-line rule that an employee has between ten and 15 business days to make a decision about whether to accept or reject new employment terms. While the majority of the Court of Appeal was not prepared to endorse that approach on the evidence before it, it also did not explicitly reject Justice Wakeling’s approach.³⁰⁵ That issue has been left for future courts to determine.

VIII. ENVIRONMENT

In this section, we discuss two cases that touch on the liabilities associated with environmental remediation. The first decision from the British Columbia Court of Appeal highlights the risks associated with relying on an environmental report prepared for a related but separate entity. The second decision, from the Alberta Court of King’s Bench, considers the definition of “person responsible” in Alberta’s *Environmental Protection and Enhancement Act*³⁰⁶ and confirms the policy considerations that must be balanced when assessing limitation period extensions pursuant to section 218 of the *EPEA*.³⁰⁷

A. *0694841 B.C. LTD. V. ALARA ENVIRONMENTAL HEALTH AND SAFETY LIMITED*³⁰⁸

1. BACKGROUND

In commercial real estate transactions, it is common for the original buyer to assign a purchase agreement to a related company prior to closing or for a related company to otherwise take title to the property. In *Alara*, the British Columbia Court of Appeal held that the assignee of a purchase agreement could not rely on the environmental site assessment (ESA) prepared for the assignor, notwithstanding that the companies were closely related. As a result, the assignee could not sue the environmental consultant when it was determined that the ESA was inaccurate.

³⁰⁵ *Ibid* at para 82.

³⁰⁶ RSA 2000, c E-12, s 107(1)(c) [*EPEA*].

³⁰⁷ *Ibid*, s 218.

³⁰⁸ 2022 BCCA 67 [*Alara*].

2. FACTS

Alara Environmental Health and Safety Ltd. (Alara) had prepared ESAs to assist their client, 0694841 B.C. Ltd. (069), with the potential purchase of a commercial property (the Property). While areas of potential environmental concern were identified in the Phase I ESA, the Phase II ESA stated that environmental contamination was not identified at the Property and no further environmental investigation was recommended.³⁰⁹ Having completed its environmental due diligence, 069 executed the original purchase agreement for the Property. Prior to closing, the purchase agreement was assigned by 069 to International Trade Center Properties Ltd. (ITC). 069 and ITC were closely related companies, sharing a single director and acting mind.³¹⁰

The Phase II ESA included a disclaimer stating that it was prepared exclusively for the use of 069, and that Alara would not assume liability for any losses resulting from any other person's use or reliance on its contents.³¹¹ Years after ITC finalized its purchase of the Property, contamination was discovered. ITC claimed that Alara was negligent in preparing the Phase II Report and sought to recover the remediation costs. The chambers judge held that ITC could not establish reasonable reliance on the Phase II ESA in the face of the disclaimer and dismissed the claim against Alara. ITC and 069 appealed.³¹²

3. DECISION

The appellants argued that the chambers judge erred in concluding that ITC's reliance on the Phase II ESA was not reasonable. They disputed the judge's finding that ITC could have protected itself by requesting Alara's consent to use the Phase II ESA or by commissioning its own environmental assessment. They further submitted that the judge overlooked material factors specific to the relationships between 069, ITC, and Alara that were sufficient to establish reasonable reliance.³¹³

The British Columbia Court of Appeal rejected the appellants' arguments. By failing to ask for Alara's consent to use the Phase II ESA, ITC was precluded from relying on the report or recovering any remediation costs from Alara. The evidence demonstrated that consent was not always granted by Alara and was not a mere formality. The fact that Alara would have granted consent was not relevant to the decision as this information was not known by ITC at the relevant time.³¹⁴

Pursuant to the assignment agreement, ITC had agreed to conduct its own due diligence. There was no evidence that ITC could not have obtained an independent Phase II ESA. "[I]t simply chose not to do so."³¹⁵ The Court of Appeal found that ITC decided to rely on the Phase II ESA prepared for 069 despite its knowledge of Alara's disclaimer. While not

³⁰⁹ *Ibid* at paras 10, 12.

³¹⁰ *Ibid* at paras 2, 5.

³¹¹ *Ibid* at para 13.

³¹² *Ibid* at paras 3–4.

³¹³ *Ibid* at paras 22–25.

³¹⁴ *Ibid* at paras 33–34.

³¹⁵ *Ibid* at para 35.

determinative, the Court also noted that the cost of commissioning an independent Phase II ESA would have been less than one percent of the purchase price.³¹⁶

Lastly, the Court held that the close relationship between 069 and ITC and other allegedly unique aspects of the transaction — such as the fact that ITC paid for the Phase II ESA — were not sufficient to distinguish this case from the “typical situation” in which a clear disclaimer operates to extinguish liability to third parties.³¹⁷ The appeal was dismissed.

4. COMMENTARY

This case highlights the importance of completing independent environmental due diligence in the context of transactions involving the assignment of a purchase agreement. If an environmental report contains inaccuracies or was negligently prepared, standard disclaimer language will generally prevent a third party from recovering damages regardless of whether the third party is closely related to the environmental consultant’s client. Potential assignees or related entities intending to rely on a related entity’s environmental due diligence should obtain the consultant’s consent through a reliance letter or via contract, or commission a separate report.

B. *PARAMOUNT RESOURCES LTD.* *V. GREY OWL ENGINEERING LTD.*³¹⁸

1. BACKGROUND

In *Paramount*, the Alberta Court of Queen’s Bench considered the extension of limitations periods in the context of alleged historic negligence and statutory liability for environmental damage.

2. FACTS

In 2004, Paramount Resources Ltd. (Paramount) undertook a project to insert a fiberglass liner into an existing steel pipeline. Among other things, the defendants (collectively referred to as Grey Owl) were involved in the supply and installation of the fiberglass liner. The technical specifications for the liner stipulated installation below the frost line to avoid damage that can be caused by water freezing inside the pipeline. The pipeline operated without incident between 2004 and 2015 when operations were discontinued. Paramount completed a successful hydrotest and reactivated the pipeline in December 2017.³¹⁹

Paramount discovered a pipeline leak in April 2018. The cost to remediate the associated environmental damage was alleged to be approximately \$20 million. Paramount commenced an action against Grey Owl in February 2019, alleging negligence in connection with

³¹⁶ *Ibid.*

³¹⁷ *Ibid.* at paras 22, 38.

³¹⁸ 2022 ABQB 333 [*Paramount*].

³¹⁹ *Ibid.* at paras 8–9.

construction of the pipeline. Specifically, Paramount alleged that Grey Owl had failed to install the pipeline deep enough to avoid exposure to frost.³²⁰

Grey Owl applied for summary dismissal, as the action had been filed after the ten-year ultimate limitation date in section 3(1)(b) of the *Limitations Act* in Alberta and was therefore time-barred.³²¹ Paramount argued that the limitation clock started running when the pipeline leak was discovered in 2018 because its action was a claim for contribution and indemnity as described in section 3(3)(e) of the *Limitations Act*.³²² In support of this position, Paramount argued that Grey Owl could have been directly liable for the environmental damage arising from the leak having regard to the definition of “person responsible” in the *EPEA*.³²³ In the alternative, Paramount argued that an extension of the limitation period pursuant to section 218 of the *EPEA* was appropriate in the circumstances.³²⁴ Section 218 of the *EPEA* authorizes an extension of the limitation period for the commencement of a civil proceeding where there is an alleged release of a substance into the environment.³²⁵

3. DECISION

Justice Kachur of the Alberta Court of Queen’s Bench granted Grey Owl’s application and summarily dismissed Paramount’s claim due to expiry of the ten-year ultimate limitation period. The limitation clock started running when the alleged negligence occurred in 2004 rather than when the leak was discovered in 2018.³²⁶ Contrary to Paramount’s argument, Grey Owl’s participation in the pipeline construction project did not amount to having “charge” over the substances transported within the pipeline. It was not, therefore, a “person responsible” for environmental damage under the *EPEA* against whom Paramount could claim contribution or equitable indemnity.³²⁷

After balancing the competing policy objectives of the *Limitations Act* and the *EPEA*, Justice Kachur determined that it was not appropriate to grant an extension of the limitation period. The ten-year ultimate limitation period prescribed by the *Limitations Act* favours finality and recognizes the problems associated with testing “ancient” claims at trial.³²⁸ Section 218 of the *EPEA* acknowledges that environmental damage often goes unnoticed for significant periods of time and may result in a significant financial burden to the public if claims relating to historic releases are not permitted to proceed. Extending the limitation period for environmental claims is warranted in circumstances where the societal benefit of having the polluter pay for environmental damage can be achieved.³²⁹ In this case, the leak was detected quickly and a “person responsible” (namely, Paramount) was available to pay. Section 218 is not intended to address any unfairness that may have resulted from Paramount’s claim against Grey Owl being limitation-barred.³³⁰

³²⁰ *Ibid* at paras 1–2.

³²¹ *Ibid* at para 3; *Limitations Act*, RSA 2000, c L–12, s 3(1)(b).

³²² *Paramount*, *ibid* at paras 13–15; *Limitations Act*, *ibid*, s 3(3)(e).

³²³ *Paramount*, *ibid* at paras 19–21; *EPEA*, *supra* note 306, s 107(1)(c).

³²⁴ *Paramount*, *ibid* at para 4; *EPEA*, *ibid*, s 218.

³²⁵ *EPEA*, *ibid*, s 218(1).

³²⁶ *Paramount*, *supra* note 318 at para 25.

³²⁷ *Ibid* at paras 22–23.

³²⁸ *Ibid* at para 29.

³²⁹ *Ibid* at paras 30–33.

³³⁰ *Ibid* at paras 34–36.

Lastly, Justice Kachur determined that there was too much uncertainty in the record to resolve the case on a summary basis. Some of the uncertainty was a result of the amount of time that had passed since the project was completed in 2004. The uncertainty resulting from the historic nature of the claim further supported the conclusion that an extension of the limitation period was not appropriate in this case.³³¹

4. COMMENTARY

While the definition of “person responsible” in the *EPEA* is often broadly interpreted, this decision confirms that the term is not intended to capture “everyone who was ever involved in construction of a pipeline.”³³² Participating in the construction of a pipeline does not amount to having charge, management, or control of the potentially polluting substances transported within the pipeline and therefore being subject to liability under the *EPEA*.

This decision provides certainty about the interplay between the *Limitations Act* and the *EPEA* in the context of recent releases alleged to have been caused by historic negligence. It confirms that section 218 is an exceptional remedy that is intended to ensure that polluters pay for the cost of environmental damage that would otherwise be borne by society. By clarifying that section 218 should not be used to facilitate claims against alleged contributors to environmental damage, this decision provides comfort that defendants involved in historic releases will be able to defeat contribution claims at an early stage of proceedings, particularly when they are not a person responsible for the released substance.

IX. INDIGENOUS LAW

Indigenous issues continue to significantly impact energy matters in courts at all levels throughout Canada. The cases discussed in this section address the potential for private entities to be held liable for their infringement of Aboriginal rights or title, the extent to which a band council resolution is necessary to bind a First Nation in contract law, and the consideration of the socioeconomic benefits for Indigenous groups when assessing the impacts of proposed resource projects.

A. *THOMAS AND SAIK’UZ FIRST NATION V. RIO TINTO ALCAN INC.*³³³

1. BACKGROUND

In *Thomas*, the British Columbia Supreme Court affirmed the plaintiffs’ Aboriginal right to fish but denied their claim for relief against the private owner of a hydroelectric dam that had impacted fish populations. The private owner’s defence of statutory authority was successful because the dam was constructed and operated in strict compliance with applicable laws and authorizations.

³³¹ *Ibid* at paras 41–42.

³³² *Ibid* at para 22.

³³³ 2022 BCSC 15 [*Thomas*].

2. FACTS

In the 1950s, the government of British Columbia authorized Rio Tinto Alcan Inc.'s (Rio Tinto) predecessor to build the Kenney Dam (the Dam).³³⁴ The Dam's operations impacted the flow of the Nechako River. The plaintiff First Nations, the Saik'uz First Nation and the Stellat'en First Nation (Saik'uz and Stellat'en), have used the Nechako River for fishing and sustenance since time immemorial. They claim an Aboriginal right to fish the Nechako River and Aboriginal title to the surrounding watershed.³³⁵

Saik'uz and Stellat'en alleged that the construction of the Dam and associated changes to water flow had adversely affected the health of the Nechako River as well as that of fish populations in the river and surrounding watershed.³³⁶ They argued that Rio Tinto was liable to them for the tort of private and public nuisance due to interference with property rights, as well as wrongful interference with riparian rights.³³⁷ Saik'uz and Stellat'en sought injunctive relief compelling Rio Tinto and the provincial and federal governments to restore the river to a more natural state to prevent further damage.³³⁸

Rio Tinto denied liability and disputed that a private, non-governmental party could be found liable in nuisance or for breach of riparian rights based on interference with Aboriginal rights. It argued that Aboriginal rights or title can only be asserted against the Crown. Further, Rio Tinto noted that construction and operation of the Dam were explicitly authorized by the government such that the defence of statutory authority should apply.³³⁹

3. DECISION

The British Columbia Supreme Court affirmed the rights of Saik'uz and Stellat'en to fish the Nechako River and surrounding area for food, social, and ceremonial purposes.³⁴⁰ The Court also held that there was sufficient evidence to demonstrate that construction and operation of the Dam had significantly altered certain fish populations within the river and consequently had profound impacts on Saik'uz and Stellat'en.³⁴¹

The Court confirmed that private entities, such as corporations and individuals, may be held liable in tort for their infringement of Aboriginal rights or title.³⁴² However, Rio Tinto was not liable in the circumstances. While Rio Tinto's actions with respect to the Dam had interfered with the use and enjoyment of the Saik'uz's and Stellat'en's Aboriginal rights to fish, the defence of statutory authority applied.³⁴³ Rio Tinto's actions were fully authorized by government. It had acted in strict accordance with applicable authorizations and could not have exercised its authority in an alternative manner that would have avoided harm.³⁴⁴

³³⁴ *Ibid* at para 3.

³³⁵ *Ibid* at paras 2–3, 9.

³³⁶ *Ibid* at para 10.

³³⁷ *Ibid* at paras 9, 25.

³³⁸ *Ibid* at para 10.

³³⁹ *Ibid* at paras 11, 12.

³⁴⁰ *Ibid* at paras 252–59, 343.

³⁴¹ *Ibid* at para 492.

³⁴² *Ibid* at paras 355–59, 383.

³⁴³ *Ibid* at paras 522, 542.

³⁴⁴ *Ibid* at para 525.

All aspects of the construction of the Dam, the way it was operated, and the scope of the resulting river regulation were expressly authorized by the provincial and federal governments. Rio Tinto had always operated within the parameters of its permits, and any deviations had been expressly authorized by a governmental agency. While the Dam had impacted the Saik'uz's and Stelat'en's rights, those impacts were authorized by the government and did not result from Rio Tinto's non-compliance with any statutory permissions.³⁴⁵ Any remedy that the Saik'uz and Stelat'en may have been entitled to could only be against the Crown, which has a duty to protect the Aboriginal right to fish.³⁴⁶

4. COMMENTARY

The British Columbia Supreme Court's findings in *Thomas* are significant for private owners and operators of infrastructure and other private land users whose actions impact Aboriginal rights or title. Notably, *Thomas* confirms that private entities can be found liable for infringements of Aboriginal rights and title. However, such liability will not arise if the infringements result from government-authorized activity and the private entity has strictly complied with the terms of applicable government authorizations. The decision highlights that it is essential to regularly review and ensure ongoing compliance with the terms of applicable permits and authorizations, as non-compliance could result in liability should there be any adverse impacts to Aboriginal rights or title.

The First Nations have appealed this decision to the British Columbia Court of Appeal.

B. *KEHEWIN CREE NATION V. KEHEW CONSTRUCTION LTD.*³⁴⁷

1. BACKGROUND

In *Kehewin*, the Alberta Court of Appeal addressed the application of the *Indian Act*³⁴⁸ to private contracts between First Nations and third parties and held that a written band council resolution is not necessary for such contracts to be legally enforceable. There are several ways by which a band council may exercise its authority to bind the First Nation in contract, including through the delegation of contracting authority. In reaching its conclusion, the Court of Appeal emphasized the evidence demonstrating that the delegation had been authorized by the band council.

2. FACTS

The Kehewin Cree Nation (Kehewin) engaged Kehew Construction Ltd. (KCL) to complete two construction projects on the Kehewin First Nation Reserve.³⁴⁹ Kehewin fell behind on payments for both projects and executed two separate written acknowledgements of indebtedness to KCL. Both acknowledgements were signed by the Chief, at the time, of

³⁴⁵ *Ibid* at para 602.

³⁴⁶ *Ibid* at paras 532, 604, 646.

³⁴⁷ 2022 ABCA 78 [*Kehewin*].

³⁴⁸ RSC 1985, c I-5.

³⁴⁹ *Kehewin*, *supra* note 347 at para 1.

Kehewin.³⁵⁰ When payments remained outstanding, KCL ceased all work on the projects and commenced an action against Kehewin to recover amounts owed.³⁵¹ As a defence, Kehewin argued that the acknowledgements of indebtedness were not binding as they were executed without any consensus, band council resolution (BCR), or delegation from the Kehewin Band Council as required by section 2(3) of the *Indian Act*.³⁵²

KCL's application for partial summary judgment was granted by the master and upheld by the chambers judge.³⁵³

3. DECISION

Kehewin's appeal was dismissed by the Court of Appeal, which upheld the chambers judge's approach to interpreting section 2(3) of the *Indian Act*.

Section 2(3)(b) of the *Indian Act* states that "[u]nless the context otherwise requires or this Act otherwise provides," powers conferred on band councils be exercised "pursuant to the consent of a majority of the councillors of the band present at a meeting of the council duly convened."³⁵⁴ In considering Kehewin's appeal, the Court noted that there are differing interpretations of section 2(3). One line of authority holds that a written BCR is required for a contract with a First Nation to be valid. The other concludes that ostensible authority may bind a First Nation and a BCR is not required. The latter line of authority is based on a contextual interpretation of the *Indian Act* and was preferred by the Court of Appeal in this case.³⁵⁵

The Court noted that sections 81 to 86 of the *Indian Act* outline the authority of band councils but are silent on the general law of contract.³⁵⁶ The authority of band councils to enter contracts is, therefore, an inferred power which must be exercised in accordance with section 2(3). The plain meaning of section 2(3) requires the consent of a majority of the councillors at a council meeting but does not specify how consent must be given.³⁵⁷ In the absence of any "formalistic requirements,"³⁵⁸ consent does not require a BCR. Instead, "[a] majority of councillors could authorize someone like the Chief to negotiate a contract and report back to council."³⁵⁹

The Court confirmed that the consent required by section 2(3) had been granted in the circumstances. The Band Council had authorized the Chief to execute contracts relative to the construction projects or to delegate that authority to someone else. The contracts at issue had been signed by the Chief or the Chief's delegate.³⁶⁰ The Court also highlighted that the Band Council was regularly informed of the work being done by KCL and the payments

³⁵⁰ *Ibid.*

³⁵¹ *Ibid* at paras 10–11.

³⁵² *Ibid* at para 1; *Indian Act*, *supra* note 348, s 2(3).

³⁵³ *Kehewin*, *ibid* at para 12.

³⁵⁴ *Indian Act*, *supra* note 348, s 2(3)(b).

³⁵⁵ *Kehewin*, *supra* note 347 at paras 17–18, 23.

³⁵⁶ *Ibid* at para 19; *Indian Act*, *supra* note 348, ss 81–86.

³⁵⁷ *Kehewin*, *ibid* at para 21.

³⁵⁸ *Ibid.*

³⁵⁹ *Ibid.*

³⁶⁰ *Ibid* at para 30.

being made, and that “none of the councillors took steps either to question what was being done or to stop [KCL] from continuing construction” when issues with payments arose.³⁶¹

Concurring in the result, Justice Slatter held that section 2(3) should be read as providing interpretive directions with respect to matters only expressly contemplated in the *Indian Act*. Since band councils are not expressly authorized to enter contracts by the *Indian Act*, section 2(3) should not apply. The Chief’s actual and ostensible authority to enter contracts and delegate that authority was sufficient to bind Kehewin in its agreements with KCL.³⁶²

4. COMMENTARY

Kehewin is informative for those entering into agreements with First Nations by confirming that a BCR is not necessarily required to bind a First Nation in contract. There are no formalistic requirements for how a band council’s consent under section 2(3) of the *Indian Act* must be granted. While the band council may authorize the Chief or others to contract on its behalf, evidence of such authorization will be important if the contract’s validity is called into question. It is therefore prudent for counterparties to request evidence of the council meeting at which contracting authority was delegated when dealing with a representative purporting to have such authority.

C. *BENGA MINING LIMITED* V. *ALBERTA ENERGY REGULATOR*³⁶³

1. BACKGROUND

In *Benga*, the Alberta Court of Appeal dismissed applications for permission to appeal the decision of a Joint Review Panel (JRP). The JRP, in its capacity as the Alberta Energy Regulator, denied Benga Mining Limited’s (Benga) application for approval to construct and operate the Grassy Mountain Steelmaking Coal Project (Project) on the basis that the Project would likely result in significant adverse environmental effects. Applications for permission to appeal the JRP’s decision were filed by Benga, the Piikani Nation (Piikani) and the Stoney Nakoda Nations (Stoney Nakoda). Piikani and Stoney Nakoda had entered into benefits sharing agreements (BSAs) with Benga and supported the Project.³⁶⁴

The Court of Appeal’s decision highlights the importance of submitting robust environmental impact assessment (EIA) materials, as well as the importance of active participation by Indigenous groups and others in favour of the Project in the regulatory process.

³⁶¹ *Ibid* at para 32.

³⁶² *Ibid* at paras 35–36.

³⁶³ 2022 ABCA 30 [*Benga*].

³⁶⁴ *Ibid* at paras 1–2, 9–10.

2. FACTS

In 2017, Benga applied for approval to construct and operate the Project.³⁶⁵ The regulatory review process undertaken by the JRP involved three stages: (1) reviewing submitted “Pre-Panel” materials, including an EIA; (2) conducting a public hearing; and (3) issuing a written decision report.³⁶⁶

In the first stage, the JRP reviewed the EIA and requested additional information as necessary to facilitate compliance with legislative requirements. When it was satisfied that such requirements had been met, the JRP issued a completeness determination letter.³⁶⁷ In the second stage, the JRP issued a notice of public hearing and informed Piikani and Stoney Nakoda that they had full participation rights in the hearing process,³⁶⁸ which each only partly utilized. Piikani submitted a technical review of Benga’s environmental impact statements and written comments in support of the Project.³⁶⁹ Stoney Nakoda filed written submissions and made an oral presentation at the hearing indicating that they did not object to the Project.³⁷⁰

The JRP’s decision report concluded that the Project was likely to cause significant adverse environmental effects and would cause loss of lands used by Treaty 7 First Nations for traditional activities and cultural heritage sites.³⁷¹ The JRP also found that Benga’s EIA provided a limited assessment of the Project’s cumulative environmental effects, and failed to consider certain risks that could reduce the Project’s positive economic impacts.³⁷² Benga, Piikani, and Stoney Nakoda sought permission to appeal the JRP’s decision.

3. DECISION

While the parties raised numerous grounds of appeal, we focus on those relating to the JRP’s completeness determination and Indigenous law issues. Ultimately, the applications for permission to appeal were dismissed.³⁷³

Benga argued that the JRP erred in law or denied Benga procedural fairness by issuing a completeness determination letter but later concluding that certain information in the EIA was incomplete or insufficient.³⁷⁴ The Alberta Court of Appeal denied permission to appeal on this ground, finding that it did not have arguable merit. The purposes of the completeness determination were to confirm: (1) that EIA content requirements prescribed by the *EPEA* had been satisfied; and (2) that sufficient information had been filed to proceed to the public hearing stage.³⁷⁵ Benga’s information had yet to be tested by interveners in the public

³⁶⁵ *Ibid* at para 4.

³⁶⁶ *Ibid* at para 14.

³⁶⁷ *Ibid* at paras 16–17.

³⁶⁸ *Ibid* at para 18.

³⁶⁹ *Ibid* at paras 20, 99–101.

³⁷⁰ *Ibid* at paras 20–21.

³⁷¹ *Ibid* at para 24. Notably, the latter finding was made even though none of the Treaty 7 First Nations (which include the Piikani and Stoney Nakoda) objected to the Project (*ibid*).

³⁷² *Ibid* at para 25.

³⁷³ *Ibid* at para 134.

³⁷⁴ *Ibid* at para 33.

³⁷⁵ *Ibid* at paras 35, 38–43.

hearing, and it was reasonable for the JRP to conclude that the information was insufficient in light of concerns raised by such interveners.³⁷⁶ The completeness determination did not preclude the JRP from finding that the EIA contained deficiencies, nor was the JRP required to request additional information from Benga to fill any gaps.³⁷⁷ The burden of satisfying the JRP's informational requirements remained with Benga before and during the public hearing process.³⁷⁸ The JRP did not err in law or deny Benga procedural fairness by deciding that the burden had not been discharged following the public hearing.

Regarding Indigenous legal issues, the Court of Appeal distilled the grounds of appeal raised by Benga, Piikani, and Stoney Nakoda into three main themes and denied permission to appeal on each theme.³⁷⁹

The first theme was whether the JRP had failed to properly consider the public interest test and honour of the Crown by not assessing how denial of the Project would impact Piikani and Stoney Nakoda. Indeed, the BSAs between Benga and the First Nations would not be implemented if the Project did not proceed. The Court acknowledged that the BSAs were not filed as evidence such that the specific benefits that would accrue to Piikani and Stoney Nakoda were not available to the JRP. However, that did not prevent the JRP from considering whether the Project was in the public interest in a manner consistent with the honour of the Crown. It was clear from the JRP's decision that sufficient information had been presented about the socioeconomic benefits of the Project.³⁸⁰ The JRP considered the potential socioeconomic benefits on Indigenous people and communities but determined that "the positive economic impacts of the project would be relatively modest."³⁸¹

The Court then considered whether the JRP had a positive obligation to request information from Piikani and Stoney Nakoda regarding the implications of not approving the Project. It concluded that this ground of appeal had no arguable merit because the JRP had sufficient information to fulfill its mandate, particularly in relation to potential socioeconomic benefits.³⁸² The Court also emphasized that the Nations had full participation rights in the public hearing. The Nations were aware of the possibility that the Project would not be approved and were entitled to file as much or as little information about Project benefits as they saw fit.³⁸³ The Nations had an appropriate opportunity to inform the JRP about the benefits that their communities would lose if the Project were denied. This was not a case where the hearing participant was not aware of the case to be met, or a case where the decision-maker refused to consider information submitted by a hearing participant.³⁸⁴

Finally, the Court held that there was no arguable merit to the parties' argument that the JRP's terms of reference prevented it from considering the positive effects of the Project on Indigenous peoples and others.³⁸⁵

³⁷⁶ *Ibid* at para 49.

³⁷⁷ *Ibid* at para 36.

³⁷⁸ *Ibid* at para 53.

³⁷⁹ *Ibid* at paras 83, 121, 128, 133–34.

³⁸⁰ *Ibid* at paras 106, 109, 117.

³⁸¹ *Ibid* at para 112.

³⁸² *Ibid* at paras 122–24.

³⁸³ *Ibid* at para 119.

³⁸⁴ *Ibid* at paras 120, 125–26.

³⁸⁵ *Ibid* at para 129.

4. COMMENTARY

Benga provides important guidance for project proponents subject to impact assessment and other regulatory review processes. The decision confirms that a completeness determination does not equate to the regulator's agreement with the accuracy or reliability of the application's contents nor place any obligation on the regulator to request additional information if gaps are identified in later stages of the review process. In addition to complying with express application requirements, proponents should consider filing information that is responsive to deficiencies identified by interested parties where feasible. The decision also suggests that proponents should provide evidence to support estimated project benefits and address risks that may impact the extent to which such benefits will be realized.

Indigenous groups that support a given project should fully participate in the applicable review process to ensure the regulator has complete information about project benefits. Where a proponent and affected Indigenous group have entered into a BSA, such information may include an explanation of how denial of the project would adversely affect the Indigenous group's economic interests. Whether *Benga* will have a significant effect in practice remains to be seen. Because the details of BSAs are typically confidential, parties face practical challenges regarding how much information they are comfortable disclosing and how much information the regulator or Crown will require.

X. INSURANCE LAW

Insurance policies are an important part of every energy operation. Questions about policy wording can result in confusion about the extent and scope of coverage. Recent decisions out of the Ontario Court of Appeal provide clarity about the duty to defend and insurance contracts insuring "physical damage."

A. *IT HAVEN INC. v. CERTAIN UNDERWRITERS AT LLOYD'S, LONDON*³⁸⁶

1. BACKGROUND

In *IT Haven*, the Ontario Court of Appeal dealt with the duty to defend in the context of alleged material misrepresentations by the insured. The Court of Appeal commented on the factors to be considered in duty to defend cases, affirming the availability in some circumstances of the contextual approach developed in *Longo v. Maciorowski*.³⁸⁷ The Court also confirmed that extrinsic evidence should be limited in duty to defend applications.

2. FACTS

The Respondents, IT Haven Inc. (IT Haven) and its sole director, Ryan Hunt (Hunt), were insured by Certain Underwriters at Lloyd's, London (Lloyd's) for errors and omissions

³⁸⁶ 2022 ONCA 71 [*IT Haven*].
³⁸⁷ [2000] 50 OR (3d) 595 (CA) [*Longo*].

coverage (the Policy). As part of IT Haven’s insurance application, it made certain material representations about the nature of its business. IT Haven represented, among other things, that it received 100 percent of its revenue in Canada, it did not provide services to the electronic games industry, and it had not incorporated any software or product designed by others into its designs.³⁸⁸

In 2019, Niantic Inc. (Niantic) commenced a claim against Hunt and a related entity, Global++, alleging that Hunt and Global++ had infringed Niantic’s copyright by creating and distributing unauthorized derivative versions of Niantic’s mobile games. Hunt and IT Haven claimed that the Global++ software was generic and did not incorporate any software designed by others.³⁸⁹

IT Haven and Hunt brought an application for a declaration that Lloyd’s was required to provide a defence against Niantic’s claim. Lloyd’s refused to make such a defence, alleging that the Respondents had made material misrepresentations in IT Haven’s application, “failed to inform [Lloyd’s] of material changes in IT Haven’s business, and breached conditions of the Policy.”³⁹⁰

The application judge allowed IT Haven and Hunt’s application, holding among other things that under the traditional “pleadings rule,” if there is a mere possibility that a claim will fall within the insurance policy, a duty to defend will arise.³⁹¹

Lloyd’s also sought to introduce extrinsic evidence to demonstrate that Hunt and IT Haven had made material misrepresentations under the Policy. The application judge rejected Lloyd’s introduction of extrinsic evidence, holding that the introduction of extrinsic evidence should be limited in duty to defend applications.³⁹²

Lloyd’s appealed the ruling of the application judge.

3. DECISION

The Ontario Court of Appeal dismissed the appeal. While the application judge had applied the incorrect test for assessing the duty to defend, a duty to defend was triggered regardless. Rather than the typical application of the “pleadings rule,” the Court of Appeal applied the flexible approach as set out in its earlier decision in *Longo*. The *Longo* approach was favoured in cases where the insurer alleges a breach of condition or material misrepresentation.³⁹³

Under the *Longo* approach, a court should consider the following non-exhaustive list of factors in determining whether a duty to defend arises:

³⁸⁸ *IT Haven*, *supra* note 386 at paras 4–7.

³⁸⁹ *Ibid* at paras 14–15, 18.

³⁹⁰ *Ibid* at para 19.

³⁹¹ *Ibid* at paras 21–22.

³⁹² *Ibid* at paras 20, 23.

³⁹³ *Ibid* at paras 30–31, 46–48, 55.

- Is the breach of condition [or misrepresentation] contested and, if so, on what basis? Is the existence of the breach [or the misrepresentation] in serious dispute?
- Is it reasonable to expect that the question of the [misrepresentation or] breach of the condition can be dealt with summarily, on an expedited basis? If so, what are the facts supporting such an expectation?
- Despite a clear [misrepresentation or] breach of statutory condition, are there circumstances that militate in favor of relief from forfeiture under the *Act*? Are such circumstances in serious dispute?
- If the insured invokes estoppel by reason of the insurer's conduct, what are the circumstances being relied upon? Is the question of estoppel in serious dispute?
- What is the status of the main action against the insured? Has discovery been held? Has a date for trial been secured? If not, when is the main action likely to be heard?

...

- What is the particular financial position of the defendant? Is he or she capable of assuming the costs of independent counsel until the issue of the breach of condition is resolved?³⁹⁴

On an assessment of these factors, the Court held that Lloyd's had a duty to defend Niantic's claim against IT Haven. The application judge had also properly excluded the extrinsic evidence.³⁹⁵

4. COMMENTARY

IT Haven lends an extra level of protection to insureds. This case demonstrates that an insurer's duty to defend is not automatically suspended by alleged breaches of conditions by an insured. Moreover, *IT Haven* suggests that insurers should resist the impulse to lead or consider extrinsic evidence when assessing their duty to defend.

B. *MDS INC. v. FACTORY MUTUAL INSURANCE COMPANY*³⁹⁶

1. BACKGROUND

In *MDS*, the Ontario Court of Appeal considered the definitions of "corrosion" and "physical damage" in the context of a dispute over a policy exclusion.

2. FACTS

MDS Inc. and its Canadian subsidiary, MDS (Canada) Inc. (together, MDS) sued their insurer, Factory Mutual Insurance Company (FM Global), for breach of their insurance policy. At issue were the proper interpretations of "corrosion" and "physical damage."³⁹⁷

³⁹⁴ *Ibid* at para 52, citing *Optimum Frontier Insurance Company v Drane*, 2004 NBCA 52 at para 24.

³⁹⁵ *IT Haven*, *ibid* at paras 38–39, 56–57.

³⁹⁶ 2021 ONCA 594 [*MDS*].

³⁹⁷ *Ibid* at paras 1–2, 13.

MDS was covered by a standard form all-risk policy which stipulated that if an excluded peril, such as corrosion, caused physical damage not excluded by the policy, the resulting damage would be insured.³⁹⁸

In May 2009, a corrosion leak affected the production of MDS' primary radioisotope supplier, resulting in a shutdown of the business of MDS for 15 months. As a result, MDS lost approximately \$121 million in profits. MDS brought a claim for these lost profits. FM Global refused coverage, arguing that the corrosion exception applied, and that MDS' claimed losses could not be categorized as "physical damage."³⁹⁹

The trial judge held in favour of MDS. The trial judge interpreted "corrosion" to apply only to anticipated corrosion. As MDS' claimed damage was caused by unanticipated corrosion, there was no ground to exclude coverage.⁴⁰⁰ FM Global appealed.

3. DECISION

The Ontario Court of Appeal allowed the appeal, denying coverage to MDS.

The Court of Appeal first found that the trial judge had incorrectly interpreted the term "corrosion." "Corrosion" had to be interpreted in accordance with the principles set out by the Supreme Court of Canada in *Sattva*⁴⁰¹ and the approach to standard form contracts in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*⁴⁰² A plain meaning approach to the term "corrosion" resulted in a definition that includes both anticipated and unanticipated corrosion. This interpretation had been widely accepted in the US jurisprudence and maintains consistency and stability of this term across insurance policies.⁴⁰³

However, as the corrosion exception did apply, the next question was whether MDS' claimed loss constituted "physical damage." The Court had no difficulty answering this question in the negative. "Physical damage" did not include "damage resulting from loss of use. While economic loss may result from physical damage, it is not physical damage."⁴⁰⁴ MDS' losses were therefore not covered.

4. COMMENTARY

MDS provides insight into the interpretation of two common phrases in standard form industry insurance contracts: "corrosion" and "physical damage." While the interpretation of corrosion is useful, it is the definition of "physical damage" that will be most instructive to counsel. The Ontario Court of Appeal in *MDS* seemed to advocate for a narrow reading of "physical damage," which excludes coverage for loss of use.

³⁹⁸ *Ibid* at paras 5–6.

³⁹⁹ *Ibid* at paras 7–8.

⁴⁰⁰ *Ibid* at paras 10–11.

⁴⁰¹ *Sattva*, *supra* note 30.

⁴⁰² 2016 SCC 37.

⁴⁰³ *MDS*, *supra* note 396 at paras 36, 39, 62–66, 71–78.

⁴⁰⁴ *Ibid* at para 97.

XI. SECURITIES LITIGATION

Two securities litigation cases during the past year provided further insight about the factors that courts consider when assessing whether information is sufficiently material to require disclosure. The courts in these cases considered the relevance of reliability as it relates to disclosure of information and the difference between a “material fact” and a “material change.”

A. *WONG V. PRETIUM RESOURCES INC.*⁴⁰⁵

1. BACKGROUND

In this case, the Ontario Court of Appeal considered whether the defendant mining company’s failure to publicly disclose the concerns of its consultant amounted to a misrepresentation by omission of a material fact.⁴⁰⁶ The Court upheld the motion judge’s summary dismissal of the class action and confirmed that it is relevant to consider the reliability of information when determining whether that information is material.⁴⁰⁷

2. FACTS

Pretium Resources Inc. (Pretium) retained Strathcona Mineral Services Ltd. (Strathcona) as a mining expert to oversee and report on a bulk sample program.⁴⁰⁸ While it conducted the bulk sample program, Strathcona offered its unsolicited opinion to Pretium that Strathcona’s sampling contradicted a prior estimate about the economic viability of one of Pretium’s assets.⁴⁰⁹ Pretium disagreed with Strathcona and was of the view that the Strathcona concerns were premature.⁴¹⁰ Pretium opted not to disclose this information to the market.⁴¹¹ Strathcona resigned from the project,⁴¹² and after Pretium announced the resignation in a news release, Pretium’s share price dropped by half.⁴¹³ Strathcona’s opinion later turned out to be incorrect.⁴¹⁴ The motion judge considered whether Pretium had a legal obligation to disclose Strathcona’s opinions to the market. The motion judge ultimately agreed with Pretium that there was no omission of material fact and that the company was not obligated to disclose information it reasonably believed to be unreliable and incorrect.⁴¹⁵ The case was then appealed.

3. DECISION

The Ontario Court of Appeal unanimously affirmed the decision of the motion judge and found that Pretium’s decision not to disclose information it considered unreliable and

⁴⁰⁵ 2022 ONCA 549 [*Wong*].

⁴⁰⁶ *Ibid* at para 1.

⁴⁰⁷ *Ibid* at paras 2–3, 79.

⁴⁰⁸ *Ibid* at para 8.

⁴⁰⁹ *Ibid* at paras 13, 20.

⁴¹⁰ *Ibid* at para 13.

⁴¹¹ *Ibid* at para 1.

⁴¹² *Ibid* at para 29.

⁴¹³ *Ibid* at paras 30–31.

⁴¹⁴ *Ibid* at para 32.

⁴¹⁵ *Wong v Pretium Resources*, 2021 ONSC 54 at para 5.

incorrect was lawful and proper.⁴¹⁶ The Court of Appeal found that the motion judge properly applied the legal test for a material fact as set out in the Supreme Court of Canada decision *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*,⁴¹⁷ which requires a “fact-specific inquiry.”⁴¹⁸ The Court held that the objective reliability of the omitted information was a relevant consideration in the determination of whether the omitted information was material from the perspective of a reasonable investor.⁴¹⁹ The Court reiterated that a “secondary market misrepresentation by omission requires evidence that disclosure already made is misleading because of the omission.”⁴²⁰ The premature Strathcona concerns were found to lack objective reliability and the decision to not disclose the information was appropriate.⁴²¹

4. COMMENTARY

Secondary market disclosure disputes remain highly fact specific. This case demonstrates that the reliability of the concern or opinions of an external consultant can be relevant to the fact-specific inquiry used to determine the materiality of information and whether it ought to be disclosed.

B. *MARKOWICH V. LUNDIN MINING CORPORATION*⁴²²

1. BACKGROUND

In this case, a rockslide occurred at an open pit mine owned and operated by Lundin Mining Corporation (Lundin).⁴²³ Instability had also been detected at the mine prior to the rockslide.⁴²⁴ Both incidents were disclosed slightly less than a month later, following which Lundin’s share price dropped. The plaintiff brought a motion to bring a secondary market misrepresentation claim for Lundin’s failure to immediately disclose both incidents.⁴²⁵ The Ontario Superior Court of Justice dismissed the motion for leave to bring the claim and declined to certify the class proceeding.⁴²⁶

2. FACTS

Lundin detected instability in the wall of an open pit mine it owned and operated on 25 October 2017.⁴²⁷ A rockslide later occurred at the same pit on 31 October 2017.⁴²⁸ Lundin published a news release on 29 November 2017 disclosing both pieces of information, and its share price dropped by 16 percent the next day.⁴²⁹ The representative plaintiff claimed that both the rockslide and the instability were “changes” to Lundin’s “business, operations or

⁴¹⁶ *Wong*, *supra* note 405 at paras 3, 54.

⁴¹⁷ 2011 SCC 23 [*Sharbern*]; *Wong*, *ibid* at para 69.

⁴¹⁸ *Wong*, *ibid* at para 74, citing *Sharbern*, *ibid* at para 61.

⁴¹⁹ *Wong*, *ibid* at paras 87, 89, 91.

⁴²⁰ *Ibid* at para 95.

⁴²¹ *Ibid* at para 109.

⁴²² 2022 ONSC 81 [*Markowich*].

⁴²³ *Ibid* at para 3.

⁴²⁴ *Ibid* at para 2.

⁴²⁵ *Ibid* at para 8.

⁴²⁶ *Ibid* at paras 28, 35.

⁴²⁷ *Ibid* at para 2.

⁴²⁸ *Ibid* at para 3.

⁴²⁹ *Ibid* at paras 4–5.

capital” considered “material” as they “would reasonably be expected to have a significant effect on the market price or value” of Lundin’s shares,⁴³⁰ and that as a result Lundin was required to disclose immediately via news release and by filing a material change report within ten days.⁴³¹ The plaintiff claimed that by waiting nearly a month later to release the information, Lundin breached its obligations pursuant to the Ontario *Securities Act*.⁴³²

3. DECISION

The Ontario Superior Court of Justice found that neither the pit wall instability nor the rockslide constituted a “change” to Lundin’s “business, operations or capital” within the meaning of the Ontario *Securities Act* that would warrant disclosure of the kind the plaintiff claimed.⁴³³ The Court held that determining whether a change has occurred is a fact-specific inquiry.⁴³⁴ Upon review of the evidence, the Court found that no change to Lundin’s business, operations, or capital had occurred due to the pit wall instability or rockslide.⁴³⁵ The evidence also did not suggest that the instability or rockslide threatened Lundin’s economic viability.⁴³⁶ The Court emphasized that there is a critical and deliberate difference between a “material change” and a “material fact,” and that while the instability and rockslide were material facts, they were not material changes because they did not result in a different position, course, or direction for Lundin’s business, operations, or capital.⁴³⁷

4. COMMENTARY

This decision contributes further to the body of case law discussing what constitutes a “material change” pursuant to the *Securities Act*. The case also sheds further light on what circumstances would require an issuer to disclose a material change to the public, which might include changes to position, course, or direction for a company’s business, operations, or capital.

XII. TAX

Tax law is a complex and ever-evolving field that requires a deep understanding of legal, financial, and economic principles. Last year, the Federal Court of Appeal held that the jurisdiction of the Tax Court of Canada is limited to determining the correctness of an assessment and does not extend to varying or quashing opinions. In addition, the Supreme Court of Canada commented on the availability of the equitable remedy of recession when parties’ mistakes result in unanticipated and undesirable tax consequences. We discuss these two cases in this section.

⁴³⁰ *Ibid* at para 13.

⁴³¹ *Ibid* at paras 9, 13.

⁴³² RSO 1990, c S.5; *ibid* at para 13.

⁴³³ *Markowich*, *ibid* at para 194.

⁴³⁴ *Ibid* at para 146.

⁴³⁵ *Ibid* at para 173.

⁴³⁶ *Ibid* at para 174.

⁴³⁷ *Ibid* at para 179.

A. *HER MAJESTY THE QUEEN*
*v. DOW CHEMICAL CANADA ULC*⁴³⁸

1. BACKGROUND

In *Dow*, the Federal Court of Appeal confirmed that the Tax Court of Canada does not have the jurisdiction to vary or quash an opinion of the Minister of National Revenue (the Minister). The Federal Court of Appeal held that the jurisdiction of the Tax Court is limited to determining the correctness of a tax assessment. Taxpayers may challenge an opinion of the Minister by way of a judicial review proceeding brought in the Federal Court.

2. FACTS

In 2011, the Minister reassessed Dow Chemical Canada ULC's (Dow Chemical) 2006 taxation year by adding approximately \$307 million to its income because of certain transfer pricing adjustments made under section 247 of the *Income Tax Act*.⁴³⁹ Dow Chemical objected to the reassessment. After the filing of the notice of objection, the Minister sent Dow Chemical a proposal letter to allow additional interest expenses in the 2006 taxation year of Dow Chemical. The Minister subsequently refused to permit those additional interest expenses.

In 2013, pursuant to section 247(10) of the *ITA*, Dow Chemical asked the Minister to reduce its income by the increased interest expense that had been identified by the Minister in her letter. Section 247(10) of the *ITA* allows the Minister to make an adjustment that decreases a taxpayer's income under the transfer pricing rules if "in the opinion of the Minister," the adjustment is appropriate.⁴⁴⁰ The Minister denied the request. Dow Chemical sought judicial review of this decision in the Federal Court. Dow Chemical also appealed the reassessment of its 2006 taxation year to the Tax Court.

Pursuant to Rule 58 of the *Tax Court of Canada Rules (General Procedure)*,⁴⁴¹ the parties asked the Tax Court to answer the following question:

Where the [Minister] has exercised her discretion pursuant to subsection 247(10) of the [ITA] to deny a taxpayer's request for a downward transfer pricing adjustment, is that a decision falling outside the exclusive original jurisdiction granted to the Tax Court of Canada under section 12 of the *Tax Court of Canada Act* and section 171 of the *ITA*?⁴⁴²

⁴³⁸ 2022 FCA 70 [*Dow*].

⁴³⁹ *Ibid* at para 7; *Income Tax Act*, RSC 1985, c 1 (5th Supp), s 247 [*ITA*].

⁴⁴⁰ *ITA*, *ibid*, s 247(10).

⁴⁴¹ SOR/90-688a, s 58.

⁴⁴² *Dow*, *supra* note 438 at para 1.

3. DECISION

The Federal Court of Appeal noted that the Minister's opinion would be outside the exclusive jurisdiction of the Tax Court of Canada if it was subject to judicial review under the jurisdiction of the Federal Court.⁴⁴³

The Federal Court of Appeal concluded that section 18.5 of the *Federal Courts Act*⁴⁴⁴ is not a bar to the Federal Court hearing a judicial review of the Minister's opinion. Section 18.5 of the *Federal Courts Act* only bars the Federal Court from reviewing a decision when another statute, such as the *ITA*, expressly provides a right of appeal. However, "subsection 247(11) of the *ITA* does not provide for a separate right of appeal from [the] opinion" of the Minister.⁴⁴⁵ Therefore, the Federal Court is not barred from reviewing the Minister's opinion.

The Federal Court of Appeal then reviewed the remedies that the Tax Court and the Federal Court could grant in this case. The Federal Court of Appeal concluded that "the remedies available to the Tax Court may not be adequate" to address the situation.⁴⁴⁶ The goal of Dow Chemical was to obtain a reassessment based on a reduction in income that reflected the downward adjustment. On appeal, the Tax Court would have had only three options available under section 171(1) of the *ITA*: (1) vacate the assessment; (2) vary the assessment; or (3) refer the assessment back to the Minister for reconsideration and reassessment.⁴⁴⁷ These remedies are all directed at the assessment. However, "[t]he opinion rendered by the Minister under subsection 247(10) of the *ITA* [was] not an assessment, although it [would have affected] an assessment."⁴⁴⁸ Unlike the Tax Court, the Federal Court has the authority to quash any decision of the Minister on an application for judicial review under section 18.1(3) of the *Federal Courts Act*.⁴⁴⁹

The Federal Court of Appeal held that the Tax Court's authority for varying or quashing the Minister's opinion could not be implicit either. The Federal Court of Appeal held that the authority granted by Parliament to the Tax Court to decide whether an assessment is correct does not, by implication, include the authority to modify or quash the opinion provided by the Minister under section 247(10) of the *ITA*. The Tax Court's jurisdiction is limited to providing remedies that directly impact the assessment. Even though "it may be more convenient" if the Tax Court had this power, it is not a necessary component of its jurisdiction over assessments.⁴⁵⁰ Therefore, the Federal Court of Appeal held that the Tax Court does not have the jurisdiction to vary or quash the Minister's opinion.

4. COMMENTARY

The decision of the Federal Court of Appeal illustrates the importance of selecting the appropriate court based on the remedy sought in tax litigation. Because of the differences

⁴⁴³ *Ibid* at para 26.

⁴⁴⁴ RSC 1985, c F-7, s 18.5.

⁴⁴⁵ *Dow*, *supra* note 438 at para 39; *ITA*, *supra* note 439, s 247(11).

⁴⁴⁶ *Dow*, *ibid* at para 66.

⁴⁴⁷ *Ibid* at para 69; *ITA*, *supra* note 439, s 171(1)(b).

⁴⁴⁸ *Dow*, *ibid* at para 77.

⁴⁴⁹ *Dow*, *ibid*; *Federal Courts Act*, *supra* note 444, s 18.1(3).

⁴⁵⁰ *Dow*, *ibid* at para 82.

between the jurisdictions of the Tax Court and the Federal Court, taxpayers and practitioners may face confusion and uncertainty when choosing the correct forum. In some circumstances, taxpayers may need to bring simultaneous proceedings in both courts to ensure the relief sought. In fact, the Federal Court of Appeal in this decision stated that “the remedies available to both courts may be required if Dow is to succeed.”⁴⁵¹ Until Parliament expands the Tax Court’s jurisdiction, taxpayers will continue to encounter fundamental jurisdictional issues and should seek professional advice about the appropriate court or courts to commence tax litigation.

B. CANADA (ATTORNEY GENERAL) V. COLLINS FAMILY TRUST⁴⁵²

1. BACKGROUND

In *Collins Family*, the Supreme Court of Canada discussed the availability of the equitable remedy of rescission when parties’ mistakes have resulted in unanticipated and undesirable tax consequences.

2. FACTS

Two different companies hired an accounting firm to advise about two comparable schemes to safeguard corporate assets from future creditors without increasing tax liabilities. Each scheme required the establishment of a family trust with a holding company being named as the trust’s beneficiary. After the holding company lent funds to the trust to purchase the shares of the operating company at fair market value, the operating company paid dividends to the trust.⁴⁵³

The published guidance of the Canada Revenue Agency (CRA) at the time provided that section 75(2) of the *ITA* would attribute the dividends paid to the trust to the holding company.⁴⁵⁴ Because intercorporate dividends are exempt from taxation pursuant to section 112(1) of the *ITA*, no tax would be payable.⁴⁵⁵

A few years after these transactions, the Tax Court ruled in *Sommerer v. The Queen*⁴⁵⁶ that, contrary to the published guidance of the CRA, section 75(2) does not apply when a trust acquires shares for fair market value rather than through gifting or settling. The CRA began an audit and then issued reassessments that retroactively prohibited the attribution of the dividends to the holding companies and taxed the dividends in the hands of the trusts.

Because of the fundamental misapprehension of the expected tax consequences of the transactions, both trusts sought rescission of all transactions leading up to and including the payment of the dividends. The British Columbia Supreme Court granted rescission in a

⁴⁵¹ *Ibid* at para 91.

⁴⁵² 2022 SCC 26 [*Collins Family*].

⁴⁵³ *Ibid* at para 2.

⁴⁵⁴ *Ibid* at paras 2–3; *ITA*, *supra* note 439, s 75(2).

⁴⁵⁵ *Collins Family*, *ibid*; *ITA*, *ibid*, s 112(1).

⁴⁵⁶ 2011 TCC 212.

substantially identical case a few years earlier: *Re Pallen Trust*, affirmed by the British Columbia Court of Appeal.⁴⁵⁷

3. DECISION

On appeal to the Supreme Court of Canada, the Crown argued that *Canada (Attorney General) v. Fairmont Hotels Inc.*⁴⁵⁸ articulated the fundamental principle that taxpayers should be taxed on what they actually did and not what they could have done. Further, transactions that parties entered into freely and voluntarily may not be altered retroactively to avoid an unintended tax consequence. The Crown submitted that the relevant test must be focused on whether the taxpayer consented to enter into the transaction. If so, the taxpayer should be responsible for the transaction's tax consequences. In *Fairmont*, the Supreme Court of Canada had restricted the application of the equitable remedy of rectification in tax contexts to situations in which the written agreement governing the parties' legal relations did not accurately reflect their actual agreement. While rectification enables a taxpayer to amend its transactions, rescission allows taxpayers to annul transactions as if they never happened.

A majority of eight judges decided in favour of the Crown. The principles outlined in *Fairmont* were held to be broadly applicable to all equitable remedies in the context of tax mistakes. The Supreme Court held that "[t]ax consequences do not flow from contracting parties' motivations or objectives ... [but rather] from the freely chosen legal relationships, as established by their transactions."⁴⁵⁹ What the taxpayer agreed to do should be the focus of the investigation. Any apparent "windfall" for the public treasury from the taxpayer losing a benefit or for the taxpayer from securing a benefit is irrelevant.⁴⁶⁰ A party's discovery that an instrument's operation results in an unfavourable and unexpected tax consequence does not automatically entitle the court to amend the instrument.

4. COMMENTARY

According to the Supreme Court of Canada, the mere fact that a mistake resulted in negative tax consequences for a taxpayer does not justify equity-based relief if the taxpayer or the taxpayer's hired tax professional either incorrectly predicted the tax consequences of a transaction or erred on the underlying facts or law.

Given this decision, taxpayers and their advisors must use care when structuring transactions. Taxpayers should provide enough time for tax counsel to thoroughly analyze such transactions. If time limitations and the nature of a proposed transaction permit, taxpayers are advised to obtain advance tax rulings from the CRA. Although these rulings are usually not enforceable in court, the CRA will often respect them, and they reduce tax uncertainty.

⁴⁵⁷ 2014 BCSC 305, aff'd 2015 BCCA 222.

⁴⁵⁸ 2016 SCC 56 [*Fairmont*].

⁴⁵⁹ *Collins Family*, supra note 452 at para 16.

⁴⁶⁰ *Ibid.*

XIII. CASES TO WATCH

The management of climate change risks by corporations and boards remains a theme in Canada and worldwide. In this section, we highlight ongoing litigation by Canadian youth alleging that Canada's climate change policies have breached their rights pursuant to sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*⁴⁶¹ as well as derivative action in the United Kingdom alleging that a corporate energy transition strategy is insufficient to manage climate risks. We also provide an update on the Government of Alberta's challenge to the constitutional validity of the *Impact Assessment Act*.⁴⁶²

A. *CECILIA LA ROSE BY GUARDIAN AD LITEM* *ANDREA LUCIUK V. THE QUEEN*⁴⁶³

In 2020, 15 youth and children from across Canada brought an action against the federal government for action and inaction on climate change, which they alleged had infringed their rights under sections 7 and 15 of the *Charter*, as well as their rights as beneficiaries under the public trust doctrine.⁴⁶⁴ As more fully discussed in the 2021 edition of this article,⁴⁶⁵ the Federal Court granted the Government of Canada's application to strike the statement of claim because it failed to disclose a reasonable cause of action. The claims involved alleged actions that were too broad and diffuse to support a *Charter* analysis.⁴⁶⁶ The Federal Court also held that the claim alleging breach of the public trust doctrine (in other words, that the government has an obligation to protect and preserve inherently public resources) did not have a reasonable prospect of success.⁴⁶⁷

The plaintiffs' application for permission to appeal the decision was heard by the Federal Court of Appeal on 14 to 15 February 2023. If the Federal Court's decision is overturned, the question of whether governments are required to mandate a minimum standard of emissions reduction could be further considered at trial.

B. *CLIENTEARTH V. SHELL PLC*⁴⁶⁸

In February 2023, ClientEarth, an environmental law charity minority shareholder of Shell plc, filed a novel derivative action in the High Court of England and Wales seeking a declaration that the directors of Shell plc failed to manage material and foreseeable climate risks and thereby breached their duty to promote the success of the company and to act with reasonable care, skill, and diligence, as per the UK *Companies Act 2006*.⁴⁶⁹ ClientEarth also sought a mandatory injunction requiring that the directors (1) adopt an energy transition

⁴⁶¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

⁴⁶² SC 2019, c 28, s 1 [IAA].

⁴⁶³ 2020 FC 1008 [*La Rose*].

⁴⁶⁴ *Ibid* at paras 2, 7.

⁴⁶⁵ Sophie Lorefice et al, "Recent Judicial Decisions of Interest to Energy Lawyers" (2021) 59:2 Alta L Rev 427 at 456.

⁴⁶⁶ *La Rose*, *supra* note 463 at para 63.

⁴⁶⁷ *Ibid* at paras 57, 87.

⁴⁶⁸ [2023] EWHC 1137 (Ch) [*ClientEarth*].

⁴⁶⁹ (UK), ss 172, 174.

strategy in alignment with the *Paris Agreement*⁴⁷⁰ and (2) comply with a Dutch court order to reduce emissions by 45 percent by 2030.

The High Court denied ClientEarth leave to pursue its claim in May 2023, finding that specific climate-related duties were *not* necessarily incidental to the directors' statutory obligations as ClientEarth had alleged. The High Court emphasized the business judgment rule and noted that courts are ill-equipped to interfere with management decisions that involve balancing a wide range of factors.⁴⁷¹ The Court also commented on ClientEarth's motivations for bringing the derivative action, noting that the purpose of the claim was seemingly to advance ClientEarth's policy agenda rather than a good faith attempt to promote the success of Shell plc for the benefit of its shareholders.⁴⁷² ClientEarth has exercised its right to have the decision reconsidered following an oral hearing.

Directors of Canadian corporations are subject to similar duties as those in the UK, and Canadian corporate statutes permit derivative actions to be brought in substantially the same manner as the UK *Companies Act 2006*. While the High Court's dismissal of ClientEarth's claim indicates that derivative actions by climate-focused interest groups will face significant challenges, analogous claims may be initiated in Canada in the coming years.

C. REFERENCE RE IMPACT ASSESSMENT ACT⁴⁷³

In *Reference re IAA*, the majority of the Alberta Court of Appeal held that the federal *Impact Assessment Act*⁴⁷⁴ and associated *Physical Activities Regulations*⁴⁷⁵ are unconstitutional. As discussed in detail in the 2022 edition of this article,⁴⁷⁶ the majority noted that the environment is not assigned to either level of government under the *Constitution Act, 1867*,⁴⁷⁷ and emphasized the subsidiarity principle (namely, that law-making and its implementation are often best achieved at the effective level of government closest to the citizens affected) to conclude that provincial jurisdiction should be favoured.⁴⁷⁸

The federal government's appeal of the decision was heard by the Supreme Court on 21 to 22 March 2023. The Supreme Court of Canada's highly anticipated decision on this matter is expected to confirm whether the federal government may retain oversight and ultimate approval authority over intra-provincial projects based on the projects' environmental effects. It will, therefore, have significant implications for natural resource development across the country.

⁴⁷⁰ 12 December 2015, 3156 UNTS 79 (entered into force 4 November 2016).

⁴⁷¹ *ClientEarth*, *supra* note 468 at para 48.

⁴⁷² *Ibid* at paras 64–65.

⁴⁷³ 2022 ABCA 165 [*Reference re IAA*].

⁴⁷⁴ *IAA*, *supra* note 462.

⁴⁷⁵ SOR/2019-285.

⁴⁷⁶ Karen Fellowes & Natasha Doelman, "Recent Judicial Decisions of Interest to Energy Lawyers" (2022) 60:2 *Alta L Rev* 541 at 591.

⁴⁷⁷ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

⁴⁷⁸ *Reference re IAA*, *supra* note 473 at paras 149–52.

D. COMPETITION BUREAU AND SECURITIES AND EXCHANGE COMMISSION GREENWASHING AND ESG DECISIONS

1. OVERVIEW

Both the Competition Bureau (the Bureau) and the US Securities and Exchange Commission (the SEC) have been engaged in significant investigations and reached settlements involving multi-million dollar penalties related to greenwashing and misstatements and omissions related to environmental, social, and governance (ESG) matters.

2. FACTS

In January 2022, Keurig Canada Inc. (Keurig) entered into a consent agreement with the Bureau forcing Keurig to pay a CDN\$3 million penalty for greenwashing.⁴⁷⁹

The Bureau launched an investigation against Keurig into the company's claims about the recyclability of its single-use Keurig K-Cup pods after it became aware of concerns that the company's claims may be false or misleading.⁴⁸⁰ The Bureau also investigated the validity of the information about the steps required to prepare the pods for recycling that the company advertised on its website, social media, and on text and logos on the K-Cups.⁴⁸¹ The investigation concluded that the claims were false or misleading because the pods were not recyclable outside of British Columbia and Quebec, and that additional steps may be required to recycle the pods contrary to the information Keurig advertised.⁴⁸² As part of its settlement agreement, Keurig agreed to pay the mentioned CDN\$3 million penalty, change its recyclable claims and packaging, and undertake other corrective measures.⁴⁸³

In May 2022, the SEC laid charges against BNY Mellon Investment Adviser, Inc. (BNY Mellon) for misstatements and omissions about ESG considerations in making investment decisions for certain mutual funds that it managed. BNY Mellon represented or implied in various statements that all investments in the funds had undergone an ESG quality review, even though that was not always the case. To settle the charges, BNY Mellon agreed to pay a US\$1.5 million penalty.⁴⁸⁴

3. COMMENTARY

The Keurig consent agreement is evidence of the increased emphasis of competition authorities on cracking down on misleading environmental claims. There are several other cases coming down the pipeline on this issue that have not yet been decided. Upcoming cases include Greenpeace's complaint to the Bureau against Shell Canada for false or misleading

⁴⁷⁹ Competition Bureau Canada, News Release, "Keurig Canada to Pay \$3 Million Penalty to Settle Competition Bureau's Concerns Over Coffee Pod Recycling Claims" (6 January 2022), online: [perma.cc/LT2A-X8EL].

⁴⁸⁰ *Ibid.*

⁴⁸¹ *Ibid.*

⁴⁸² *Ibid.*

⁴⁸³ *Ibid.*

⁴⁸⁴ *BNY Mellon Investment Adviser, Inc.* (23 May 2022), 3-20867, online: [perma.cc/ZXU3-TQJX].

claims related to its Drive Carbon Neutral products,⁴⁸⁵ and the Bureau's probe into the Royal Bank of Canada, investigating claims that the bank's climate leadership statements are misleading due to its continued financing of fossil fuel projects.⁴⁸⁶

Both the Keurig settlement and the BNY Mellon order demonstrate the rising importance of ESG and how misrepresentations regarding the environmental friendliness of activities and other issues related to ESG disclosure can get issuers in hot water with competition authorities. The upcoming decisions will shed further light on the approach competition authorities will take with future greenwashing and ESG non-compliance complaints.

⁴⁸⁵ “‘Driving Carbon-Neutral’ is Impossible with Fossil Fuels: Complaint to the Competition Bureau of Canada Against Shell’s Misleading Promotion of Forest-Based ‘Offsets’ as Sustainable, Climate Action” (November 2021), online (pdf): *Greenpeace* [perma.cc/DE3M-8E64].

⁴⁸⁶ Letter from Adam Zimmerman, Competition Bureau Canada to Matt Hulse and Andhra Azevedo, Ecojustice (29 September 2022), online (pdf): *Ecojustice* [perma.cc/WEC7-728Z].

[this page is intentionally blank]