RECENT JUDICIAL DECISIONS OF INTEREST TO ENERGY LAWYERS

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This article summarizes a number of recent judicial decisions of interest to energy lawyers. The authors review and comment on the past year's case law in several areas including Aboriginal law, contractual interpretation, corporate governance and shareholder rights, employment and labour law, environmental law, utility regulation, constitutional law, and selected developments in civil procedure. Specific topics addressed include the duty to consult, plans of arrangement, the duty of good faith in contractual relations, environmental claims upon insolvency, and the constitutionality of federal climate change legislation. For each case, some background information is given, followed by a brief explanation of the facts, a summary of the decision, and some commentary on the outcome.

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I. ABORIGINAL

A. *CANADA (GOVERNOR GENERAL IN COUNCIL) V. MIKISEW CREE FIRST NATION* [1]

1. BACKGROUND

Mikisew involved an appeal and cross-appeal of a judgment rendered by the Federal Court, granting in part the Chief of the Mikisew Cree First Nation's (MCFN) application claiming that the Governor General and various ministers breached their duty to consult the MCFN on the development and parliamentary introduction of two omnibus bills.[2] The issue on appeal was whether the Crown has an obligation to consult when contemplating changes to legislation that may adversely affect treaty rights.[3]

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1 2016 FCA 311, 405 DLR (4th) 721 [*Mikisew*], leave to appeal to SCC granted, 37441 (18 May 2017).
2 *Ibid* at para 1.
3 *Ibid* at para 2.

2. FACTS

MCFN is a band within the meaning of the *Indian Act*,[4] whose ancestors adhered to *Treaty No. 8*,[5] "which guarantees their right to hunt, trap and fish throughout the territory covered by that treaty."[6] MCFN alleged that the omnibus bills, which would make significant changes to some environmental laws, reduced federal regulatory oversight on projects that might affect their treaty rights, and as such, the ministers had a duty to consult with the MCFN.[7]

3. DECISION

The majority of the Federal Court of Appeal held that the lower Court was incorrect in finding that the introduction of the omnibus bills to Parliament triggered a duty to consult with the MCFN.[8] The majority considered the requirements for the Court to engage in judicial review under the *Federal Courts Act*[9] and held that sections 18 and 18.1 required that: (1) the remedy sought pertain to an identifiable decision; and (2) the impugned decision must be made by a "federal board, commission or other tribunal."[10] The Court determined that the source of power the ministers exercised in introducing the omnibus bills was derived from their status as members of Parliament and did not meet the requirement under step two of the test.[11] In this case, the ministers were not acting as statutory decision-makers, but rather as legislators whose actions are immune to judicial review.[12]

Although the majority held that the foregoing was sufficient to allow the appeal, they went on to consider the doctrine of separation of powers and parliamentary privilege on the basis that it provides "a more fundamental and principled reason" as to why the appeal must be dismissed.[13] The majority stressed that the courts will only judicially review legislation that has already been enacted, unless a court is specifically asked pursuant to a reference, and that imposing a duty to consult at this stage of the legislative process would fetter the law-making capacity of members of Parliament.[14]

Justice Pelletier, concurring as to the decision, provided a different reason for granting the appeal. He determined that the MCFN application did not fail based on procedural irregularity but rather failed because the duty to consult cannot be "triggered by legislation of general application whose effects are not specific to particular Aboriginal peoples or to the territories in which they have … an interest."[15]

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4 RSC 1985, c I-5.
5 *Treaty No 8 Made June 21, 1899*, online: <www.aadnc-aandc.gc.ca/eng/1100100028813/1100100028853>.
6 *Mikisew*, *supra* note 1 at para 4.
7 *Ibid* at paras 5–6.
8 *Ibid* at paras 3, 13.
9 RSC 1985, c F-7.
10 *Mikisew*, *supra* note 1 at paras 22–23, citing *ibid*, s 2(1).
11 *Mikisew*, *ibid* at paras 23, 33, 38.
12 *Ibid* at paras 33, 38.
13 *Ibid* at para 39.
14 *Ibid* at paras 53, 60.
15 *Ibid* at para 91.

4. COMMENTARY

This case indicates that legislative action is not a proper subject for an application for judicial review, and that importing the duty to consult into the legislative process offends the separation of powers doctrine and the principle of parliamentary privilege. The Supreme Court had previously declined to consider this question,[16] but it has recently granted leave to appeal for this case, so it may decide on this issue.[17]

If it does, the Supreme Court will have to address a number of issues. One of these is that, as pointed out by the majority, the doctrine of the separation of powers is well-recognized and has been relied on by the Supreme Court before. However, as also recognized by the majority, there is a clear tension in the case law between the doctrine of the separation of powers and the duty to consult that has developed as a result of section 35 of the *Constitution Act, 1982*.[18]

Interestingly, notwithstanding that the majority recognizes this tension, there is virtually no discussion in the majority's decision of the section 35 side of the equation, including the purposes that section 35 is designed to serve and how the role of Aboriginal peoples outlined in the majority's decision serves these principles. While this may not dictate a different outcome, if the Supreme Court considers this issue, it will likely have to define the extent of section 35 rights vis-à-vis legislative powers, and how each constitutional principle limits the other.

As it stands, *Mikisew* greatly constrains the recourse First Nations have when faced with legislative action which they perceive to be detrimental to their rights. Essentially, a party seeking to challenge legislative decisions will have to wait until a law is enacted and then challenge it on constitutional grounds. It is important to note that the decision was only about the legislative process; whether the duty to consult applies in the case of delegated legislative decisions, such as the making of rules or regulations, is not commented on and is left for a future case.

B. *FORT NELSON FIRST NATION V. BRITISH COLUMBIA (ENVIRONMENTAL ASSESSMENT OFFICE)*[19]

1. BACKGROUND

In *Fort Nelson*, Canadian Silica Industries Inc. (CSI) successfully appealed a decision that found that the Environmental Assessment Office's (EAO) interpretation of the *Reviewable Projects Regulation*[20] (the Regulations) adversely affected the Fort Nelson First Nation's (FNFN) treaty rights.[21] At issue was whether a proposed frac sand mine (the Project) located within the traditional territory of the FNFN was a reviewable project under the

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16 See *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650.
17 See *supra* note 1.
18 Being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
19 2016 BCCA 500, [2017] 4 WWR 422 [*Fort Nelson*].
20 BC Reg 370/2002.
21 *Fort Nelson*, *supra* note 19 at paras 124–25.

Environmental Assessment Act[22] and the Regulations and would therefore require an environmental assessment certificate from the EAO.[23]

2. FACTS

CSI took the position that the Project was not reviewable by the EAO as the Project fell below the reportable threshold required under the Regulations.[24] In support of its position, CSI provided that "the term 'production capacity' refers to the amount of sand or gravel that would be sold or used in the operation."[25] Via letter, the EAO expressed its agreement with CSI's interpretation of "production capacity" and that, under this interpretation of the Regulations, the Project was not reviewable.[26] The EAO also stressed that its letter was not to be construed as advice on the application of the Regulations to the Project.[27]

The FNFN disagreed with CSI's interpretation of "production capacity" and, in a series of letters with the EAO, asserted that the correct interpretation of "production capacity" was the total amount of sand and gravel that would be excavated from the ground in the production process.[28] In its responses to the FNFN's letters, the EAO set forth its reasons for supporting the CSI interpretation of "production capacity" and the corresponding non-reviewable status of the Project.[29]

3. DECISION

The Court of Appeal held that the *EAA* and the Regulations do not contemplate the exercise of the EAO's statutory power to decide the reviewability of a project at this stage, nor does the correspondence between the EAO and CSI or between the EAO and the FNFN amount to a decision of a person's legal rights by the EAO.[30] The Court determined that although the judicial relief sought by the FNFN was unavailable in these circumstances, the merits of the issue would nonetheless be considered on the basis that the parties argued such merits and the EAO's interpretation of the Regulations guides a participant's action.[31]

The Court held that the EAO's interpretation of the Regulations was reasonable, was entitled to deference in light of the EAO's expertise, and provided administrative simplicity and certainty to applicants.[32] In support of its reasoning, the Court also stressed the prematurity of the application and noted that the FNFN are not prevented from applying to the Minister to designate the Project as reviewable in the future.[33]

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22 SBC 2002, c 43 [*EAA*].
23 *Fort Nelson*, *supra* note 19 at para 1.
24 *Ibid* at para 3.
25 *Ibid*.
26 *Ibid*.
27 *Ibid*.
28 *Ibid* at para 4.
29 *Ibid* at para 37.
30 *Ibid* at paras 31, 54.
31 *Ibid* at paras 61-63.
32 *Ibid* at paras 108, 110, 112.
33 *Ibid* at para 114.

The Court of Appeal further held that a duty to consult will arise in the approval process; however, it is not triggered by the interpretation of a regulation standing alone.[34] The Court held that imposing a duty to consult with respect to the Regulations can lead to inconsistent interpretations and applications across different projects and stakeholders.[35] The Court further held that if it was incorrect and a duty to consult did arise in these circumstances, the duty was fulfilled by the exchange of letters between the FNFN and the EAO which set forth the EAO's reasons for its decision.[36]

4. COMMENTARY

Consistent with *Mikisew*,[37] this decision emphasizes that the duty to consult is meant to apply in decision-making that has a specific impact on First Nations. The decision also indicates that a non-binding opinion given by an environmental regulator will not be subject to judicial review, possibly making parties less hesitant to request guidance from regulators and regulators more willing to provide such guidance.

II. CIVIL PROCEDURE

A. *LIZOTTE V. AVIVA INSURANCE COMPANY OF CANADA*[38]

1. BACKGROUND

In *Lizotte*, the Supreme Court of Canada considered whether the principle from *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*[39] relating to solicitor-client privilege also applies to litigation privilege. The principle from *Blood Tribe* is that "any legislative provision capable of interfering with solicitor-client privilege must be read narrowly and that a [piece of legislation] may not abrogate that privilege by inference, but may only do so using clear, explicit and unequivocal language."[40]

2. FACTS

The Chambre de l'assurance de dommages (ChAD) in Quebec oversees more than 15,000 damage insurance agents and brokers, as well as claims adjusters.[41] The assistant syndic of the ChAD (the Syndic) was conducting an ethics inquiry into a claims adjuster. In the course of this inquiry, the Syndic requested from Aviva Insurance Company of Canada (Aviva) a complete copy of its claim file with respect to one of its insured.[42] This request was based on section 337 of the *Act respecting the distribution of financial products and services* which states as follows:

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34 *Ibid* at paras 122, 126.
35 *Ibid* at para 124.
36 *Ibid* at para 127.
37 *Supra* note 1.
38 2016 SCC 52, [2016] 2 SCR 521 [*Lizotte*].
39 2008 SCC 44, [2008] 2 SCR 574 [*Blood Tribe*].
40 *Lizotte*, *supra* note 38 at para 1.
41 See Chambre de l'assurance de dommages, "About Us," online: <www.chad.qc.ca/en/about-us>.
42 *Lizotte*, *supra* note 38 at para 2.

> Insurers, firms, independent partnerships and mutual fund dealers and scholarship plan dealers registered in accordance with Title V of the Securities Act (chapter V-1.1) must, at the request of a syndic, *forward any required document or information concerning the activities of a representative*.[43]

During this time, the insured brought legal proceedings against Aviva to obtain compensation. Aviva consequently refused to produce the complete file to the Syndic and explained that it had withheld some of the documents on the basis that they were covered by litigation privilege. The Syndic responded to this refusal by filing a motion for a declaratory judgment in order to obtain the documents. The Syndic conceded that solicitor-client privilege could be asserted against her and therefore the issue before the Court was limited to the documents covered by litigation privilege.[44]

The Quebec Superior Court ruled in favour of Aviva, finding that, in the absence of express language, the *ADFPS* did not abrogate litigation privilege.[45] The Quebec Court of Appeal upheld the judgment.[46]

3. DECISION

The Supreme Court dismissed the Syndic's appeal. Section 337 of the *ADFPS* does not establish a valid abrogation of privilege. Litigation privilege is a fundamental principle of the administration of justice and a class privilege. The principle from *Blood Tribe* applies to litigation privilege and therefore it cannot be abrogated by inference and cannot be lifted absent a clear, explicit, and unequivocal provision to that effect.[47]

4. COMMENTARY

This case is notable for more clearly defining litigation privilege as a class privilege that is "central to the justice system,"[48] even though it may not attract the same close-to-absolute protection of solicitor-client privilege. The decision provides guidance to those working within regulatory regimes with arguably ambiguous statutory language requiring production to the regulator.

Justice Gascon, for a unanimous Supreme Court, made the following important comments regarding litigation privilege:

(1) Litigation is a class privilege. "[O]nce there is a document created for 'the dominant purpose of litigation' … and the litigation in question or related litigation is pending 'or may reasonably be apprehended' … there is a '*prima facie* presumption of inadmissibility.'"[49]

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43 CQLR c D-9.2, s 337 [*ADFPS*] [emphasis added].
44 *Lizotte*, *supra* note 38 at para 11.
45 See *Chauvin c Aviva, compagnie d'assurances du Canada*, 2013 QCCS 6397, 2013 QCCS 6397 (CanLII).
46 See *Lizotte c Aviva, compagnie d'assurances du Canada*, 2015 QCCA 152, 2015 QCCA 152 (CanLII).
47 *Lizotte*, *supra* note 38 at para 71.
48 *Ibid* at para 4.
49 *Ibid* at para 33, citing *Blank v Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 SCR 319 at paras 38, 59; *R v Gruenke*, [1991] 3 SCR 263 at 286.

(2) Litigation privilege is subject to the same clearly defined exceptions as solicitor-client privilege but is not subject to a case-by-case balancing exercise. A balancing test would lead to unnecessary uncertainty and a proliferation of pretrial motions in civil litigation.[50]

The Supreme Court considered an exception based on urgency and necessity and noted that "[t]o establish [an] urgency exception in a disciplinary context, the existence of an urgent investigation in which extraordinary harm is apprehended during the period in which litigation privilege applies would instead be needed."[51] However, the Supreme Court left it to a later date and a more appropriate fact record to conduct a detailed analysis of its application.[52]

(3) Litigation privilege can be asserted against anyone, not just against the other party to the litigation.[53] The Supreme Court rejected the narrow exception put forward by the Syndic, which was that litigation privilege could not be asserted against third party investigators who have a duty of confidentiality. The Supreme Court noted that "[e]ven where a duty of confidentiality exists, the open court principle applies to proceedings that can be initiated by a syndic," jeopardizing the privilege.[54]

Moreover, the possibility of a party's work being used by the Syndic in preparing for litigation could discourage that party from writing down what he or she has done. The Supreme Court recognized that this could result in a chilling effect on parties preparing for litigation, who fear that documents otherwise covered could be made public.[55]

B. *BARD V. CANADIAN NATURAL RESOURCES*[56]

1. BACKGROUND

In *Bard*, the plaintiffs (collectively, Devon) sought an order compelling further production and disclosure by the defendant, Canadian Natural Resources Limited (CNRL). Among the requests was one to produce a series of documents in their native electronic format despite what was set out in a discovery agreement between the parties.

2. FACTS

The parties were litigating a dispute related to an oil sands project and had entered into a discovery agreement allowing the parties to produce their documents in tag image file format (TIFF) as opposed to in native format. A TIFF is a scanned copy of a document which can be text searched but little else. A document in native format is produced in the form it

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50 *Lizotte*, *ibid* at para 39.
51 *Ibid* at para 44.
52 *Ibid* at para 45.
53 *Ibid* at para 47.
54 *Ibid* at para 50.
55 *Ibid* at para 53.
56 2016 ABQB 267, 86 CPC (7th) 35 [*Bard*].

is maintained in a party's systems and is fully searchable. For example, a Microsoft Word document is produced in Microsoft Word format.

Devon requested the production of records in their native format, including spreadsheets that had already been produced as TIFF versions. CNRL argued that the records requested were not relevant and material but, even if they were, they had already been produced in the TIFF format in accordance with the production protocol established in the parties' discovery agreement. CNRL also argued that producing these documents would impose an undue burden disproportionate to the probative value of the records.[57]

3. DECISION

The Court ordered CNRL to reproduce the documents in native format as requested by Devon, despite the discovery agreement in place.[58]

Justice Nixon first considered whether the records were both relevant and material in accordance with established principles under rule 5.2(1) of the Alberta *Rules of Court*.[59] "To say that a document is relevant means that it is of primary relevance (i.e. it furnishes evidence of the facts directly in issue) or secondary relevance (i.e. it furnishes evidence of facts from which primary facts may be directly inferred)."[60] Materiality is a question of proof: "will this record *significantly* help determine an issue or ascertain evidence that will significantly help determine an issue in dispute? If so, the record is material."[61]

With regards to whether records already produced in accordance with the discovery agreement should be reproduced in native format, Justice Nixon adopted the comments of Justice Perell of the Ontario Superior Court:

> While I agree that discovery plans are important and that generally speaking a court should not allow the significant effort to establish a plan becoming a waste of time and effort by not holding parties to their agreement, discovery plans are just that, they are a plan and there is an old maxim that it is a bad plan that admits of no modification.[62]

The Court held that production in a format other than the one in which they were originally created did not give Devon meaningful access to what were otherwise relevant, material records, and therefore the native documents should be produced.[63] Additionally, "[p]roducing records in an unusable format undermines procedural fairness and just results."[64]

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57 *Ibid* at para 63.
58 *Ibid* at para 125.
59 AR 124/2010 [*ARC*].
60 *Bard*, *supra* note 56 at para 67.
61 *Ibid* at para 68.
62 *2038724 Ontario Ltd v Quizno's Canada Restaurant Corp*, 2012 ONSC 6549, 2012 ONSC 6549 (CanLII) at para 130, cited in *Bard*, *ibid* at para 96.
63 *Bard*, *ibid* at para 112.
64 *Ibid* at para 115.

Justice Nixon declined to exercise her discretion under rule 5.3(1) of the *ARC*, which empowers the Court to alter the normal disclosure obligations if the expense or difficulty would be grossly disproportionate to the likely benefit. The proportionality principle must be applied in the context of each case. Here, Devon sought damages that could reach hundreds of millions of dollars and $1 million in punitive damages. The principle of proportionality did not "figure prominently."[65]

4. COMMENTARY

This decision evinces a movement in the legal community to produce all documents in native format when possible. The case also emphasizes the importance of "usability" when producing documents. As stated by Justice Nixon:

> Usability is as much a concern for a litigant as it is for the Court. Producing records in an unusable format undermines procedural fairness and just results. It does not help to narrow the issues in dispute, and not only impairs the plaintiff's ability to prove its case, but also threatens the Court's ability to understand the evidence put before it. Thus, there is value in producing the spreadsheets in native format whether or not they contain #REF errors when Devon opens them on its own computer network.[66]

This case indicates that usability considerations are important enough to the Court to eclipse a litigation agreement between parties.

III. CONTRACT

A. *LAKEVIEW VILLAGE PROFESSIONAL CENTRE CORPORATION V. SUNCOR ENERGY INC.*[67]

1. BACKGROUND

This case deals with a relatively novel area of law in Alberta: an extension of a limitation period allowing plaintiffs to recover against defendants in instances of environmental contamination far beyond the ultimate statutory ten year limitation period. Such an extension is available under the *Environmental Protection and Enhancement Act*;[68] however, the procedural application of this section has rarely been dealt with in Alberta's jurisprudence.

2. FACTS

The plaintiff was looking to purchase land in the Lakeview subdivision of Calgary in 1998.[69] At that time, the plaintiff was aware that there was once a gas station operating on the land.[70] The plaintiff was concerned about environmental contamination. However, an initial environmental assessment found no significant contamination and the plaintiff

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65 *Ibid* at para 7.
66 *Ibid* at para 115.
67 2016 ABQB 288, [2017] 1 WWR 314 [*Lakeview*].
68 RSA 2000, c E-12 [*EPEA*].
69 *Lakeview*, *supra* note 67 at para 1.
70 *Ibid*.

completed the purchase.[71] In 2013, the plaintiff received an offer to purchase the Lakeview subdivision.[72] Another environmental assessment was done and significant contamination was discovered.[73] At the time of this application, the plaintiff had spent $400,000 on remediation of the lands, with further costs expected.[74] The plaintiff wanted to recoup some of these costs from the former owners of the land, including both the gas station operator, Suncor Energy Inc. (Suncor), and the vendor of the lands that commissioned the first environmental assessment, Commonwealth Business Management Ltd. (Commonwealth).[75]

As the events giving rise to the contamination occurred well before the expiry of the ten-year ultimate limitation period under the *Limitations Act*,[76] the plaintiff would normally be barred from pursuing this claim. However, section 218 of the *EPEA* allows judges "to extend a limitation period where the basis for the proceeding is that the release of a substance into the environment resulted in an adverse effect."[77] The plaintiff applied to the Court under this section to extend the limitation period and allow the action to proceed.[78]

3. DECISION

Justice Martin first determined that the overarching purpose of section 218 of the *EPEA* "is to extend the period in which civil proceedings can be initiated for damages to the environment, recognizing that harmful effects of contamination may not be evident for several years."[79] In addition, Justice Martin concluded that the factors laid out in section 218 are designed to ensure that the system for extending limitation periods is not left open to abuse.[80]

In assessing applications under section 218 of the *EPEA*, Justice Martin reasoned that the responsible decision-maker must consider whether or not there is sufficient evidence of the factors enumerated in section 218 to grant such an extension.[81] If the evidence presented at the time of the application is not sufficient to make this determination, the applicant must show a good, arguable case for extension.[82] If a good, arguable case can be shown, the claimant will be entitled to the extension. However, the limitation issue will survive and will only be determined finally at trial.[83] In order to proceed to trial in these applications, the plaintiff must show that after consideration of the section 218 factors, they have a good, arguable case and further that "their argument for an extension is grounded on some evidence and … is not fanciful."[84]

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71 *Ibid*.
72 *Ibid* at para 2.
73 *Ibid*.
74 *Ibid*.
75 *Ibid* at paras 3, 22.
76 RSA 2000, c L-12, s 3(1)(b).
77 *Lakeview*, *supra* note 67 at para 5.
78 *Ibid* at paras 3-4.
79 *Ibid* at para 7.
80 *Ibid*.
81 *Ibid* at para 19.
82 *Ibid* at para 18.
83 *Ibid* at para 19.
84 *Ibid* at para 18.

In this case, the plaintiff had relied completely on the results of the first environmental assessment.[85] Suncor argued that this reliance was unreasonable.[86] Suncor further argued that the contamination could have been caused by the Husky gas station that had been operating in close proximity to the lands in question.[87] For its part, Commonwealth, as the initial vendors of the land, argued that section 218 is only intended to impose liability on parties that caused or contributed to the contamination of the lands.[88] Commonwealth asserted that it did not cause or contribute to the contamination, and therefore, it could not properly be held liable under section 218 of the *EPEA*.[89]

Justice Martin made findings on the following factors, enumerated in section 218 of the *EPEA*: "when the adverse effect occurred; whether the adverse effect ought to have been discovered by the claimant through the exercise of due diligence; whether the defendant will be prejudiced from maintaining a defence to the claim on the merits; and any other relevant criteria."[90] First, Justice Martin concluded that despite the fact that the alleged contamination could have occurred as far back in time as 1969, this time frame was not so long ago that allowing the action to proceed would be unfair to either party.[91] Further, Justice Martin concluded that the plaintiff's reliance on the initial environmental assessment done by the vendors was not unreasonable. The report was completed by professionals, and there was no reason for the plaintiff to question its validity or to suspect the report was misleading.[92] There was no further responsibility on the plaintiff to conduct further due diligence despite the fact that the terms of the purchase and sale agreement explicitly required the purchaser (the plaintiff) to satisfy themselves that there was no environmental contamination on the lands prior to completion of the purchase.[93] In addition, "[n]either Suncor nor Commonwealth [presented any evidence] that an extension to the limitation period would [have] prejudice[d] their ability to maintain a defence" in this case.[94] Finally, Justice Martin concluded that the wording of section 218 is sufficiently broad to impose liability on parties that did not cause or contribute to the contamination of lands.[95] In coming to this conclusion, Justice Martin pointed out that the definition of "persons responsible" in section 107 of the *EPEA* explicitly includes previous owners of a contaminated site.[96]

Ultimately, there was sufficient evidence presented by the plaintiff to support the argument that section 218 should apply to extend the limitation period in this case. However, there were some merit-based issues regarding the sufficiency of the plaintiff's due diligence that precluded Justice Martin from granting an outright extension.[97] While an extension was ultimately granted, it was granted subject to final determination of the issue at trial.[98]

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85 *Ibid* at para 33.
86 *Ibid* at para 34.
87 *Ibid* at para 32.
88 *Ibid* at para 35.
89 *Ibid*.
90 *Ibid* at para 38.
91 *Ibid* at paras 39–40.
92 *Ibid* at para 41.
93 *Ibid* at para 50.
94 *Ibid* at para 52.
95 *Ibid* at para 53.
96 *Ibid* at para 54.
97 *Ibid* at para 56.
98 *Ibid*.

4. COMMENTARY

As Justice Martin observed in her decision, "[t]his type of application is fairly novel in Alberta."[99] As such, there was little case law to direct her reasoning.[100] The case provides guidance as to how section 218 will be applied. Because the extension was granted, there may be a renewed interest in bringing applications under this section. The *Lakeview* decision therefore highlights the importance of due diligence and directs careful consideration of apportioning environmental liability in purchase and sale transactions.

This case also shows that section 218 applications can extend to parties who were not directly responsible for the environmental contamination in question. Subsequent purchasers (like Commonwealth in this case) can incur liability on the resale of their property despite the fact that contamination existed prior to their ownership of the land.

B. *LEDCOR CONSTRUCTION LTD. V. NORTHBRIDGE INDEMNITY INSURANCE CO.*[101]

1. BACKGROUND

This case revisits the applicable standard of review when interpreting contracts. Significantly, the Supreme Court of Canada in *Ledcor* recognized an exception to their recent ruling that, in general, cases involving the interpretation of contracts will involve questions of mixed fact and law and therefore are reviewable on a deferential standard.

2. FACTS

This case involves the interpretation of an exclusion clause in a standard form contract for the provision of "all-risk" property insurance.[102] The clause excluded coverage for the "cost of making good faulty workmanship" but, as an exception to that exclusion, nonetheless covered "physical damage" that "results" from the faulty workmanship.[103]

Ledcor Construction Limited (Ledcor) and Station Lands Ltd. (Station) as general contractor and owner of the recently built EPCOR Tower, respectfully, were named as insured parties under an all-risk property insurance policy.[104] This insurance policy covered work performed by Ledcor, as well as any subcontractors hired to complete the work.[105] Station hired Bristol Cleaning (Bristol) to clean the windows of the EPCOR Tower following installation.[106] In performing this work, Bristol damaged the windows so badly that they had to be replaced.[107] This replacement cost a total of $2.5 million.[108] Station and Ledcor claimed

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99 *Ibid* at para 10.
100 *Ibid*.
101 2016 SCC 37, [2016] 2 SCR 23 [*Ledcor*].
102 *Ibid* at para 1.
103 *Ibid*.
104 *Ibid* at paras 6–8.
105 *Ibid* at para 1.
106 *Ibid* at para 7.
107 *Ibid* at para 8.
108 *Ibid*.

this cost against the policy through their insurers.[109] The insurers denied the claim on the basis of the aforementioned exclusion clause.[110]

At the trial level, the Court found that the exclusion clause was ambiguous.[111] Applying the principle of *contra proferentem*, which allows a court to construe an ambiguous clause against the party that drafted it, the Court of Queen's Bench concluded that the clause should be interpreted against the insurers and allowed the claim.[112] At the Alberta Court of Appeal, the trial judge's decision was overturned on the basis that the exclusion clause was not ambiguous; therefore, the trial judge had applied the incorrect legal test.[113]

Relying on a new test of physical or systemic connectedness, the Court of Appeal concluded that the damage to the windows was physical loss excluded from coverage as part of the "cost of making good faulty workmanship," because it was not accidental or fortuitous; rather, it was directly caused by the scraping and wiping motions involved in Bristol's cleaning work.[114]

3. DECISION

The Supreme Court distinguished *Sattva Capital Corp. v. Creston Moly Corp.*,[115] recognizing *Ledcor* as an exception to its previous ruling that contractual interpretation is a question of mixed fact and law reviewable on a deferential standard, based on the fact that in *Ledcor,* the contract in question was a standard form contract.[116] The resulting high precedential value of the decision and the relative unimportance of the factual matrix surrounding the contract was more akin to a question of law, and therefore weighed in favour of reviewing the Court of Appeal's decision on the standard of correctness rather than reasonableness.[117]

Justice Wagner (delivering the majority judgment on behalf of Chief Justice McLachlin and Justices Abella, Moldaver, Karakatsanis, Gascon, Côté, and Brown) emphasized that the fundamental purpose of appeal courts is to ensure consistency in the law.[118] Where contracts are standard form, interpretation of them may have significant precedential value, and thus appellant courts must ensure consistency of interpretation.[119] This argument is bolstered by the surrounding commercial reality of insurance contracts. Both insurance companies and customers will benefit from certainty and predictability in the interpretation of standard form contracts, as these types of contracts are used as a matter of course in the insurance industry.[120] Further, standard form contracts are generally given on a "take-it-or-leave-it" basis, rather than allowing for any negotiation or customization of terms.[121] As a result, the

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109 *Ibid*.
110 *Ibid*.
111 *Ibid* at para 12.
112 *Ibid*.
113 *Ibid* at para 13.
114 *Ibid* at paras 14–15.
115 2014 SCC 53, [2014] 2 SCR 633 [*Sattva*].
116 *Ledcor*, *supra* note 101 at para 24.
117 *Ibid* at para 34.
118 *Ibid* at para 36.
119 *Ibid* at para 39.
120 *Ibid* at para 40.
121 *Ibid* at para 28.

factual matrix within which the contract was entered into was regarded as unhelpful and relatively unimportant in determining the meaning of contractual provisions in standard form contracts.[122]

The precedential value and relative unimportance of the factual matrix in most standard form contracts led Justice Wagner to the conclusion that the decision of the Court of Appeal should be reviewed on a standard of correctness.[123] However, Justice Wagner specified that there is no bright-line rule between what decisions will constitute questions of law and which will concern questions of mixed fact and law when it comes to reviewing decisions that interpret contracts.[124] The key difference between when contractual interpretation will constitute a question of law or of mixed fact and law is the level of precedential value, or general application, the resulting interpretation will have in other cases.[125] Further, a standard form contract may attract a reasonableness standard of review if the facts surrounding that particular standard form contract will assist in its interpretation, or if the parties have negotiated and modified what was initially a standard form contract.[126]

Applying the standard of correctness to the Court of Appeal's decision, the majority found that the Court of Appeal erred in applying the new test and concluding that the damage to the windows was excluded under the policy.[127] After concluding that the exclusion clause was ambiguous, Justice Wagner applied the standard rules of contractual interpretation, taking into account the following: (1) the reasonable expectations of the parties; (2) avoiding interpretations that lead to unrealistic results; and (3) promoting interpretations that are consistent with the common law.[128]

As there was no negotiation and no indication that the parties had turned their minds to the interpretation of the exclusion clause at all, the factual circumstances surrounding the contract were not helpful in indicating the expectations of the parties.[129] As such, Justice Wagner focused instead on the overarching purpose of "all-risk" insurance contracts to indicate what the parties would have expected when entering into such a contract.[130] These contracts are generally designed to provide broad coverage to construction projects, which are singularly susceptible to accidents and errors.[131] The broad nature of these contracts supports the interpretation that the exclusion clause must be narrow in its application, excluding from coverage only the cost of redoing the faulty work itself (in this case, re-cleaning the windows).[132]

Justice Wagner also noted that it is important to avoid interpretations that would bring about results that the parties would not have contemplated, taking into account the

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122 *Ibid* at paras 28, 32.
123 *Ibid* at para 46.
124 *Ibid* at para 41.
125 *Ibid*, citing *Sattva*, *supra* note 115 at para 51.
126 *Ledcor*, *ibid* at para 48.
127 *Ibid* at para 58.
128 *Ibid* at paras 63–94.
129 *Ibid* at para 65.
130 *Ibid* at para 66.
131 *Ibid*.
132 *Ibid*.

commercial atmosphere in which the parties entered into the contract.[133] In this case, Justice Wagner sought to avoid any interpretation that would either have enabled the insurer to pocket a large premium with relatively low risk, or alternatively, an interpretation that would have allowed the insured to achieve a recovery that could not have been anticipated at the time the contract was entered into.[134] Again, this factor weighed in favour of interpreting the exclusion clause so that it only excluded the cost of redoing the faulty work from coverage.[135]

Following a canvass of case law dealing with faulty workmanship, Justice Wagner concluded that this result was not at odds with the prevailing judicial approach.[136] In fact, the majority of case law relied on by the insurer in this case dealt with faulty design rather than faulty workmanship.[137] Not only were the cases distinguishable in this sense, they were also not inconsistent with Justice Wagner's own interpretation in this case.[138]

Justice Wagner ultimately held that the cost of replacing the damaged windows did not fall within the exclusion clause. Therefore, the cost was properly covered by the insurance plan in question.[139] Finally, Justice Wagner opined that even if he had not found that the general rules of contractual interpretation provided a sufficient interpretation of this clause, he would have nevertheless come to the same conclusion on the basis of the *contra proferentem* rule.[140]

4. COMMENTARY

This precedent broadens the scope of appeal for insurance contract decisions by returning the standard of review to correctness. The Supreme Court acknowledged the importance of consistent interpretation in standard form contracts, and this may lead to more litigation and appeals granted in the short-term of insurance and other standard form contract disputes. However, in the long-term, this decision should reduce the amount of disputes ending up in court because there will be a body of precedents that can be applied broadly, without regard to the surrounding circumstances of contract formation. Contracting parties should therefore be aware of how standard form contract language has been interpreted by the courts when drafting their agreements.

C. *NORTHROCK RESOURCES, A PARTNERSHIP V. EXXONMOBIL CANADA ENERGY*[141]

1. BACKGROUND

This case involved the interpretation of a right of first refusal (ROFR) provision. In *Northrock*, the Saskatchewan Court of Queen's Bench held that where the effect of the

133 *Ibid* at para 78.
134 *Ibid* at para 79.
135 *Ibid*.
136 *Ibid* at para 92.
137 *Ibid* at para 91.
138 *Ibid* at para 92.
139 *Ibid* at para 95.
140 *Ibid* at para 96.
141 2016 SKQB 188, [2017] 2 WWR 559 [*Northrock*].

decision to structure a transaction in a certain way results in the circumvention of a ROFR, this will not amount to a breach of the overarching duty of good faith in contractual relations as long as such circumvention was not the party's primary object.

2. FACTS

ExxonMobil Canada Energy (ExxonMobil) wanted to sell certain oil and gas producing assets in Saskatchewan.[142] ExxonMobil sent out a Non-Binding Bid Letter wherein it proposed that the sale of these assets could proceed by one of two different deal structures.[143] The first structure was a straight asset purchase.[144] The second was called a "busted butterfly" structure.[145] In the busted butterfly structure, ExxonMobil would incorporate a new company, transfer the assets to that company, and the successful bidder would purchase all the shares in the new company. The two structures had different tax implications.[146] Most bidders were willing to pay more for the asset purchase, and as a result, the busted butterfly bids were generally lower.[147] One bidder, Crescent Point General Partner Corp. (Crescent Point), was unable to benefit from the tax implications of an asset purchase and was therefore willing to pay the same amount for the busted butterfly approach.[148] Crescent Point's bid for the busted butterfly deal structure was ultimately selected as the successful bid.[149]

Northrock Resources (Northrock) held ROFRs that were applicable to the sale of a small portion of the assets in question.[150] Northrock objected to ExxonMobil's ultimate plan to transfer the shares of the new corporation to Crescent Point, based on the reasoning that "you cannot achieve something indirectly that you cannot achieve directly,"[151] as this transaction would ultimately circumvent the ROFRs.

ExxonMobil argued that the ROFR provisions addressed an owner's sale of interests, and did not address the sale of the shares of the owner of interests. Therefore, the ROFR provisions were not triggered by the busted butterfly transaction.[152]

3. DECISION

Justice Currie concluded that as the ROFR provisions were not ambiguous, they were to be interpreted in a plain, straightforward manner, "consistent with the ordinary meaning of the words and consistent with the other provisions of the agreements."[153] This interpretation of the ROFRs clearly indicated that they were not triggered by the busted butterfly transaction structure. The transfer to an affiliate was expressly exempted from the ROFRs.[154] In addition, the ROFRs were not triggered by the sale of the shares of the owner of an

142 *Ibid* at para 10.
143 *Ibid* at para 14.
144 *Ibid*.
145 *Ibid* at para 13.
146 *Ibid* at para 15.
147 *Ibid* at para 16.
148 *Ibid* at para 17.
149 *Ibid* at para 24.
150 *Ibid* at para 12.
151 *Ibid* at para 26.
152 *Ibid* at para 28.
153 *Ibid* at para 42.
154 *Ibid* at paras 43–44.

interest.[155] Justice Currie emphasized the fact that the parties in this case were both sophisticated entities, equipped with lawyers, accountants, and many other advisors.[156] If the parties wanted a transaction such as the busted butterfly to trigger the ROFR provisions, they could have bargained for this to be included in the ROFR provisions; however, they did not.[157]

Northrock had also argued that ExxonMobil and Crescent Point breached their duty of good faith in failing to provide Northrock with ROFR notices.[158] Justice Currie canvassed the law pertaining to the duty of good faith in contractual performance, specifically focusing on the seminal case of *Bhasin v. Hrynew*.[159] Justice Currie concluded that *Bhasin* imposed upon contracting parties a duty to deal with each other honestly and not capriciously or arbitrarily.[160] The organizing principle of good faith requires parties not to lie or purposely mislead each other with regards to their contractual performance. Applying this organizing principle, Justice Currie concluded that as long as a party does not set out to avoid a ROFR, the duty of good faith will not be considered breached simply because a disposition that "amount[s] to" a sale avoids triggering a ROFR.[161]

In this case, it was the existence of tax benefits that motivated ExxonMobil to choose to pursue the busted butterfly structure.[162] Justice Currie was not persuaded by the fact that, in reality, the possible tax benefits ExxonMobil expected from the busted butterfly transaction were not guaranteed, or that the Canada Revenue Agency was resisting the effectiveness of the transaction for tax purposes.[163]

Justice Currie made similar findings with respect to Crescent Point. It was not significant that the evidence also illustrated that both parties had, prior to the transaction taking place, recognized that the busted butterfly deal structure would likely circumvent the ROFRs.[164] On this point, Justice Currie concluded that "[k]nowledge does not always translate into intention, and in this case it did not."[165] The transactions were allowed, and the failure to provide ROFR notices did not constitute a breach of contract.

4. COMMENTARY

This case confirms the line of case law that holds there is no breach of good faith obligations if a chosen structure defeats a ROFR, as long as the structure was not chosen for the purpose of defeating the ROFR. The case is also further confirmation that courts do not see *Bhasin* as a wholesale change to the law, but rather a formal recognition of long-standing principles.

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155 *Ibid* at para 43.
156 *Ibid* at para 51.
157 *Ibid* at para 52.
158 *Ibid* at para 57.
159 2014 SCC 71, [2014] 3 SCR 494 [*Bhasin*].
160 *Northrock*, *supra* note 141 at para 61.
161 *Ibid* at para 63.
162 *Ibid* at para 89.
163 *Ibid* at paras 85–87.
164 *Ibid* at para 104.
165 *Ibid*.

Besides *Bhasin*, Justice Currie relied on previous case law dealing with a duty of good faith in the context of ROFRs. He began with *GATX Corp. v. Hawker Siddeley Canada Inc.*,[166] and quoted the following:

> It is well established that the grantor of a right of first refusal must act reasonably and in good faith in relation to that right, and must not act in a fashion designed to eviscerate the very right which has been given. This is an illustration of the application of the good faith doctrine of contractual performance, which in my view is a part of the law of Ontario.[167]

In *GATX*, the Court found that the defendant breached its good faith obligations when it structured a sale to avoid a ROFR. However, in that case, the defendant admitted to entering into the arrangement to avoid the ROFR. Justice Currie did not engage in a wholesale analysis of *GATX*, but did note that the case states there is a breach if the essential purpose of a structure is to avoid a ROFR.[168] He canvassed subsequent cases and the approaches therein, and determined that a court is required to analyze the intention of the party to determine whether there was a breach.[169]

Justice Currie noted that there was another possible scenario: that the avoidance of ROFRs was not the sole reason but a contributing reason to the choice of structure. The issue of whether this was permitted was left to be decided on another day.[170]

D. *TRANSOCEAN DRILLING UK LTD V. PROVIDENCE RESOURCES PLC*[171]

1. BACKGROUND

In *Transocean*, the English Court of Appeal was asked to determine whether the owner of a semi-submersible oil-drilling rig was liable for consequential losses resulting from a period of delay caused by a breach of contract, notwithstanding the terms of the contract on which the owner relied excluded any liability for losses of that kind.

2. FACTS

On 15 April 2011, the owner of the rig, Transocean Drilling UK Ltd. (Transocean), entered into a contract with Providence Resources Plc (Providence), to drill an appraisal well in the Barryroe field off the southern coast of the Republic of Ireland (the Agreement).[172] The Agreement "was based on a standard industry agreement known as the 'LOGIC' form, which the parties adapted to meet their particular needs."[173]

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166 (1996), 27 BLR (2d) 251 (Ont Ct J (Gen Div)) [*GATX*].
167 *Ibid* at para 73, cited in *Northrock*, *supra* note 141 at para 62.
168 *Northrock*, *ibid* at para 62.
169 *Ibid* at para 69.
170 *Ibid* at para 68.
171 [2016] EWCA Civ 372, [2016] 2 All ER (Comm) 606 [*Transocean*].
172 *Ibid* at para 2.
173 *Ibid*.

On 18 December 2011, drilling operations were suspended until 2 February 2012 as a result of the misalignment of part of the blow-out preventer.[174] This delay gave rise to various disputes between the parties, in particular, regarding the remuneration payable to Transocean in respect of … the right of Providence to recover additional overheads, known as 'spread costs,' resulting from the extended period of work."[175] At the heart of the matter "was the question whether the delay had been caused by one or more breaches of contract on the part of Transocean" and whether Transocean was liable for the spread costs.[176]

Indemnities in the contract were given by each party that "were clearly designed to complement each other [and] contained a detailed and sophisticated scheme for apportioning responsibility for loss and damage of all kinds, backed by insurance."[177] These types of "knock for knock" indemnities allocated losses arising from or relating to the performance of the contract between the two parties, regardless of cause.

In particular, clause 20 of the Agreement "contained mutual undertakings by [both parties] to indemnify each other against, and hold each other harmless from, its own consequential loss, as defined in that clause."[178] The issue on appeal was "whether wasted spread costs incurred by Providence as a result of Transocean's breaches of contract are 'consequential losses' within the meaning of clause 20."[179]

3. DECISION

The Court of Appeal held that the phrase "loss of use," as defined in the definition of consequential loss as part of clause 20 of the Agreement, "naturally refers to the loss of the ability to make use of some kind of property or equipment owned or under the control of the contractor or the company, as the case may be."[180] The parties made it clear by the words in parentheses that followed the term "loss of use" that the scope of this phrase was intended to be wide.[181]

In this case, the parties were of equal bargaining power and entered into mutual undertakings to accept the risk of consequential loss flowing from each other's breaches of contract. The Court held that the clause was to be seen as an integral part of a broader scheme in the Agreement for allocating losses between the parties. Relying on the decision in *Photo Production Ltd. v. Securicor Transport Ltd.*,[182] the Court recognized that artificial approaches to the construction of commercial contracts are to be avoided in favour of giving the words used by the parties their ordinary and natural meaning.[183] Further, recent decisions support the principle that courts "should give the language used by the parties the meaning

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174 *Ibid* at para 3.
175 *Ibid*.
176 *Ibid*.
177 *Ibid* at para 9.
178 *Ibid* at para 8.
179 *Ibid* at para 13.
180 *Ibid* at para 17.
181 *Ibid*.
182 [1980] UKHL 2, [1980] AC 827.
183 *Transocean*, *supra* note 171 at para 23.

which it would be given by a reasonable person in their position furnished with the knowledge of the background to the transaction common to [both parties]."[184]

The Court of Appeal found that the trial judge was wrong to invoke the *contra proferentem* principle. It has "no part to play … when the meaning of the words is clear" and when the clause "favours both parties equally, especially where they are of equal bargaining power."[185]

The language of clause 20 was clear and excluded liability for wasted costs in the form of the spread costs which Providence sought to recover. The principle of freedom of contract required the Court to give effect to the parties' Agreement.[186]

4. COMMENTARY

This case directs that courts will respect the intentions of contracting parties as indicated by the plain words of the contract, even if the effect is to bar claims that otherwise would have been recoverable at law. The Court of Appeal considered the entirety of the Agreement to note that the parties had entered into mutual undertakings to accept the risk of consequential losses.

This case also confirms that courts will be reluctant to apply the *contra proferentem* principle in situations where the parties are sophisticated commercial entities. The assumption is that these parties are knowingly bargaining for what the plain words of the contract mean, including allocation of liability.

E. *BANK OF MONTREAL v. BUMPER DEVELOPMENT CORPORATION LTD.*[187]

1. BACKGROUND

The Alberta Court of Queen's Bench in *Bumper Development* had to decide whether Eagle Energy Inc. (Eagle) could enforce its right to operatorship under oil operating agreements during a court-ordered stay of proceedings pursuant to a receivership order.[188]

2. FACTS

On 16 February 2016, the Bank of Montreal applied for a receivership order with respect to Bumper Development Corporation Ltd. (Bumper). The order was granted and Alvarez & Marsal Canada Inc. (the Receiver) was appointed receiver-manager over all of the assets of Bumper pursuant to section 243 of the *Bankruptcy and Insolvency Act*.[189] "The objective of

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184 *Ibid* at para 14. See *Chartbrook Ltd v Persimmon Homes Ltd*, [2009] UKHL 38, [2009] 1 AC 1101; *Arnold v Britton*, [2015] UKSC 36, [2015] AC 1619.

185 *Transocean*, *ibid* at para 20.

186 *Ibid* at para 28.

187 2016 ABQB 363, 38 CBR (6th) 118 [*Bumper Development*].

188 *Ibid* at para 1.

189 RSC 1985, c B-3 [*BIA*].

the receivership was to protect and realize upon Bumper's assets and distribute the proceeds to the stakeholders under the supervision of the Court."[190]

At the time the receivership order was granted, Eagle and Bumper were parties to a Joint Operating Agreement (JOA) that pertained to several wells, and an agreement for the construction, ownership, and operation of the Twining 16-20-31-24 W4M Battery (the Battery).[191] The JOA was governed by the 2007 Canadian Association of Petroleum Landmen (CAPL) operating procedure, which provides for the immediate replacement of an operator in the case of bankruptcy or insolvency.[192] The Battery agreement also contained provisions that entitled Eagle to become the operator if the current operator, in this case Bumper, became insolvent and was placed into receivership.[193] Upon learning of the receivership order, Eagle notified the Receiver of its intention to assume operatorship of both the JOA wells and the Battery.[194]

On 29 February 2016, the Receiver informed Eagle that pursuant to paragraph 9 of the Receivership Order, the notices were stayed and Bumper remained the operator of both the JOA wells and the Battery.[195]

Meanwhile, Bumper's interest in the JOA wells and the Battery were put up for sale and bids were received from both Eagle and Forent Energy Ltd. (Forent).[196] "Forent was the successful bidder and the Receiver applied for approval of the sale of Bumper's interest to Forent and for a Vesting Order."[197] Eagle applied to have the Court recognize Eagle's right to become operator of the assets after the sale, as it did not want a vesting order to go through if its rights to be the operator were affected.[198]

As part of the Vesting Order issued on 11 May 2016, the Court ordered that the sale was to be without prejudice to Eagle's right to argue the issue of operatorship at a later date, which was the subject of this application.[199]

3. DECISION

Justice Macleod held that it was clear from the JOA that Eagle was entitled to be operator of the JOA wells and the Battery upon Bumper becoming insolvent or being placed in receivership.[200] The Court found no reason to interfere with the contractual rights of Eagle, which are not subject to the security of Bumper's creditors.

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190 *Bumper Development*, *supra* note 187 at para 2.
191 *Ibid* at para 3.
192 *Ibid* at para 5.
193 *Ibid* at para 6.
194 *Ibid* at para 8.
195 *Ibid* at para 9.
196 *Ibid* at para 10.
197 *Ibid* at para 14.
198 *Ibid*.
199 *Ibid* at para 15.
200 *Ibid* at para 17.

The stay of proceedings was granted incidental to the appointment of the Receiver to allow for orderly realization and distribution of Bumper's assets. Eagle's contractual right did not interfere with that process.[201]

The Court further found that Eagle acted reasonably by meeting with the Receiver's representatives regarding the stay, and that Eagle believed it would be the operator even if it were not the successful bidder for the underlying assets.[202] It further noted that "Forent did not have any reasonable expectation that it was purchasing operatorship."[203]

Depriving Eagle's clear contractual right to be the operator of both the wells and the Battery would be "tantamount to appropriating Eagle's right for the benefit of Bumper's creditors."[204]

Accordingly, the stay was lifted *nunc pro tunc* and Eagle's application was granted.[205]

4. COMMENTARY

Justice Macleod considered both the expectations of the parties and the reasonableness of Eagle's actions in coming to his conclusion. Notably, he distinguished the case of *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*,[206] where section 11 of the *Companies' Creditors Arrangement Act*[207] was at issue:

> Section 11 gives very broad powers to the Court in situations where arrangements involving compromise can be utilized to rescue insolvent companies. The *CCAA* has proved to be an extraordinarily flexible Act. The Act has been used effectively to give debtors respite from creditors in order to allow the stakeholders to negotiate a proposal for continuing the business, rather than allowing the business to fall into bankruptcy. Here, the issue is not Bumper's survival but the realization on its assets.[208]

This ruling indicates that the courts will treat proceedings under the *BIA* and the *CCAA* (1970) differently with a view to statutory purpose.

F. *IFP TECHNOLOGIES (CANADA) INC. V. ENCANA MIDSTREAM AND MARKETING*[209]

1. BACKGROUND

The Alberta Court of Appeal's decision in *IFP Technologies* will impact principles of contractual interpretation in Alberta. The decision follows the most recent contract law

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201 *Ibid* at para 19.
202 *Ibid* at para 22.
203 *Ibid*.
204 *Ibid* at para 23.
205 *Ibid* at para 27.
206 (1988), 92 AR 81 (QB).
207 RSC 1970, c C-25 [*CCAA* (1970)].
208 *Bumper Development*, *supra* note 187 at para 20.
209 2017 ABCA 157, 53 Alta LR (6th) 96 [*IFP Technologies*].

principles espoused by the Supreme Court and indicates that Alberta courts will take a more interventional approach going forward.

In addition to the legal principles discussed below, the Court recognized that business "craves certainty" and "is understandably risk averse,"[210] so ensuring the proper interpretation of contractual obligations is essential to the economic well-being of the country, especially in Alberta's oil and gas sector where investments are often measured in millions, if not billions, of dollars.[211]

2. FACTS

The appellant, IFP Technologies (Canada) Inc. (IFP) was a French-owned research and development company. The respondents included a number of Canadian oil and gas parties including PanCanadian Resources (PCR). IFP claimed that a contract formed with PCR conveyed to it an undivided 20 percent working interest in oil and gas leases for a property in Alberta known as Eyehill Creek.[212] PCR insisted that IFP's interest in Eyehill Creek was limited to an undivided 20 percent interest only in oil and gas produced through certain recovery methods.[213]

The matter was initially heard over the course of a six week trial. The original Court of Queen's Bench justice who oversaw the trial proceedings died before a decision was rendered. The parties agreed not to hold a new trial, but rather elected to have the Chief Justice of the Court of Queen's Bench (the Trial Judge) decide the matter based on the written trial record.[214] The Trial Judge ruled in favour of PCR on the basis that, among other things, the term "working interest" was not defined in IFP's contract with PCR, and "working interests" was referenced only in relation to certain thermal and enhanced recovery methods.

IFP appealed on the claimed basis that the Trial Judge made a number of errors of law. Critically, IFP maintained that the term "working interest" was a legal term of art, which had a specific meaning in the context of the Canadian oil and gas industry. The Court of Appeal noted that the Trial Judge's decision predated two groundbreaking decisions of the Supreme Court on contractual interpretation: *Sattva*[215] and *Bhasin*.[216]

3. DECISION

In her majority reasons for judgment reserved (there was a dissenting judgment), Chief Justice Fraser allowed the appeal and reversed the decision of the Trial Judge. In doing so, she clarified and developed the law in Alberta with respect to the principles of contractual interpretation.

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210 *Ibid* at para 3.
211 *Ibid* at para 2.
212 *Ibid* at para 1.
213 *Ibid*.
214 *Ibid* at para 5.
215 *Supra* note 115.
216 *Supra* note 159.

The Chief Justice began her decision with a forceful defence of a commercially reasonable approach to contract interpretation, which recognizes the presumption that contracts are entered into in good faith.[217]

The Chief Justice held that a practical, common sense approach was required where a court is called upon to determine what the parties to a contract intended.[218] She held that contractual interpretation must not be an exercise in second guessing what could have been included in the contract, but rather an exercise in determining the objective intention of the parties in a manner that accords with sound commercial principles and good business sense.[219]

The Chief Justice made a number of important statements with respect to the principles of contractual interpretation and the standard of review thereof, as paraphrased below:

Factual Matrix: A trial judge must consider the surrounding circumstances or "factual matrix" of a contract, regardless of whether the contract is ambiguous. It is an error of law for a trial judge to discount or disregard evidence of the factual matrix on the basis that a contract is not ambiguous. An appeal court will review such an error on the correctness standard.[220]

Parol Evidence Rule: It does not offend the parol evidence rule for a trial judge to consider the factual matrix where there is no ambiguity in a contract. The rule precludes evidence that would "subtract from, vary, or contradict" the written words of a contract.[221] Evidence of the factual matrix, conversely, is an objective interpretive aid to assist in ascertaining the meaning of the written words of a contract.[222] A trial judge must consider the factual matrix to ensure that he or she has a proper understanding of the parties' mutual and objective intentions as expressed in the words of the contract. This includes evidence of the negotiation of the contract and antecedent agreements.[223]

Terms of Art: A legal term of art that has a common meaning to participants in a given industry need not necessarily be defined in a contract. If the term has an accepted meaning and usage in a sector, its interpretation by the courts has precedential value and it must be interpreted consistently. In that respect, a term of art is analogous to a standard form contract. For a trial judge to misinterpret a term of art is an error of law, which the Court will review on the correctness standard. Likewise, it is an error of law reviewable for correctness for a trial judge to disregard a legal term of art or to fail to recognize that a legal term of art has a certain meaning.[224]

The Chief Justice signalled that the Court will take a more interventionist role in ensuring that Alberta courts interpret contracts in a practical, common sense, and consistent manner.

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217 *IFP Technologies*, *supra* note 209 at para 2.
218 *Ibid* at para 65, citing *Sattva*, *supra* note 115 at para 47.
219 *IFP Technologies*, *ibid* at para 89.
220 *Ibid* at para 113.
221 *Ibid* at para 81.
222 *Ibid*.
223 *Ibid* at paras 80–83.
224 *Ibid* at paras 60–62.

4. COMMENTARY

Whether one agrees with the result or not (there was a strong dissenting judgment), the Chief Justice's decision appears to be a call for a more commercially reasonable approach to contractual interpretation and may be a harbinger of a trend which will be adopted in other jurisdictions based on the Supreme Court of Canada case of *Sattva*.[225] In clarifying the above principles, the Chief Justice seems to be reversing the trend in recent years wherein complex contractual disputes are often resolved through arbitration. The Chief Justice posited that perhaps companies have or will be motivated to pursue arbitration if court decisions on contractual interpretation are disconnected from economic reality.[226]

The Alberta Court of Appeal's approach to a term of art also accords with the *Ledcor*[227] decision, where the Supreme Court determined that standard form contracts should be scrutinized by the courts more carefully because of their precedential value. Similarly, a term of art definition can have great precedential value and the courts will be more active in enforcing an interpretation that is consistent with commercial usage.

The decision provides clarity for litigants seeking to enforce their contractual rights and may be persuasive in other jurisdictions. It also provides more robust rights of appeal to ensure that litigants have recourse where trial courts make erroneous findings or evidentiary rulings when called upon to interpret contracts.

IV. CORPORATE GOVERNANCE AND SHAREHOLDER RIGHTS

A. *MENNILLO V. INTRAMODAL INC.*[228]

1. BACKGROUND

In *Mennillo*, the first oppression remedy case to be heard by the Supreme Court since *BCE Inc. v. 1976 Debentureholders*,[229] the Supreme Court clarified how the oppression remedy operates within closely held corporations, and whether a failure to comply with the formalities of the *Canada Business Corporations Act*[230] during a share transfer can constitute oppression.

2. FACTS

Mr. Mennillo, the appellant, and Mr. Rosati were the sole shareholders and directors of Intramodal, a transportation company they incorporated in 2004. Mennillo contributed the funds to start up the business. Fifty-one shares were issued to Rosati and 49 shares were issued to Mennillo.[231]

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225 *Supra* note 115.
226 *IFP Technologies*, *supra* note 209 at para 65.
227 *Supra* note 101.
228 2016 SCC 51, [2016] 2 SCR 438 [*Mennillo*].
229 2008 SCC 69, [2008] 3 SCR 560 [*BCE*].
230 RSC 1985, c C-44 [*CBCA*].
231 *Mennillo*, *supra* note 228 at para 21.

On 25 May 2005, Mennillo resigned as officer and director through a signed resignation letter. Months later, and unbeknownst to Mennillo, Rosati adopted a resolution, backdated to 25 May 2005, by which Intramodal approved a verbal transfer of all Mennillo's shares to Rosati.[232]

Intramodal paid back all the funds advanced by Mennillo between July 2006 and December 2009.[233] Once the funds were repaid, Mennillo discovered that he was no longer a shareholder in the corporation. In September 2010, he commenced an oppression action against Intramodal, alleging that the corporation and Rosati wrongly removed him as a shareholder and that he was frozen out of the corporation in an oppressive manner.[234]

The trial judge dismissed the claim on the factual finding that Mennillo had undertaken to remain a shareholder only as long as he was willing to guarantee the corporation's debts, and had indicated verbally to Rosati in May 2005 that he was no longer willing to do so.[235] The Quebec Court of Appeal dismissed the appeal.

3. DECISION

The trial judge's ruling was upheld and the oppression claim was dismissed.

The Supreme Court confirmed the test for an oppression claim as laid out in *BCE*: (1) the claimant must identify his or her expectations that have been violated and establish that those expectations were reasonably held; and (2) "the claimant must show that those reasonable expectations were violated by conduct falling within the statutory terms, that is, conduct that was oppressive, unfairly prejudicial to or unfairly disregarding of the interests of any security holder."[236]

The majority of the Supreme Court concluded that "the fact that a corporation fails to comply with the requirements of the *CBCA* does not, on its own, constitute oppression."[237] The trial judge's factual findings were not reviewable because no palpable and overriding error had been made.[238] Based on these factual findings, Mennillo could have no reasonable expectation of being treated as a shareholder.[239]

An action in oppression is measured against "business realities," not "narrow legalities."[240] It is an "equitable action [designed] to protect reasonable and legitimate shareholder expectations,"[241] and "sloppy paperwork on its own does not constitute oppression."[242]

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232 *Ibid* at paras 24–32.
233 *Ibid* at para 30.
234 *Ibid* at para 32.
235 *Ibid* at para 4.
236 *Ibid* at para 9.
237 *Ibid* at para 11.
238 *Ibid* at para 55.
239 *Ibid* at para 57.
240 *Ibid* at para 18.
241 *Ibid* at para 84.
242 *Ibid* at para 5.

Context is significant for the oppression analysis and in this case, the "dealings between the parties were marked by extreme informality."[243]

The Supreme Court also noted in *obiter* that the Court of Appeal had erred in concluding that a share subscription could be retroactively cancelled by simple verbal agreement and without complying with the required legal formalities.[244] This did not affect the oppression proceeding.

Justice Côté penned a strong dissent in which she accused the majority of the Court of Appeal of violating the fundamental principle that a corporation's personality is distinct from its shareholders.[245] Justice Côté found that "Intramodal … confused its interests with those of its majority shareholder"[246] and that a verbal agreement between two shareholders does not amount to an agreement with the corporation on the terms of a withdrawal of a shareholder. She also noted that shareholders should be "entitled to expect a corporation to act in accordance with its articles and by-laws and, more generally, with the law."[247]

4. COMMENTARY

While in this case failure to comply with corporate law formalities did not amount to oppression, the majority of the Supreme Court did not rule out that failure to comply could constitute oppression in certain cases. Where corporate law formalities have not been complied with, shareholders should consider also pursuing claims under sections 247 (compliance order) or 243 (rectifying of records) of the *CBCA*, which provide a remedy for failure to comply with the legislation that does not rely on a violation of the applicant's "reasonable expectations."

Shareholders should also exercise caution when entering into collateral agreements, whether verbal or written. This decision creates the potential that collateral shareholder agreements may be read as synonymous with an agreement between a shareholder and the corporation.

B. *INTEROIL CORPORATION V. MULACEK*[248]

1. BACKGROUND

InterOil is a significant decision for its potential impact on the sufficiency of fairness opinions, and because of the increased level of analysis undertaken by the Yukon Court of Appeal in its decision to deny a plan of arrangement for being unfair.

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243 *Ibid* at para 10.
244 *Ibid* at para 63.
245 *Ibid* at paras 91–92.
246 *Ibid* at para 101.
247 *Ibid* at para 180.
248 2016 YKCA 14, 408 DLR (4th) 636 [*InterOil*].

2. FACTS

In this case the applicant, a dissident shareholder, appealed a ruling of the Yukon Supreme Court, made under section 195 of the *Business Corporations Act*,[249] which held that a proposed plan of arrangement was fair and reasonable.[250] The arrangement in question involved Exxon Mobil Corporation (Exxon) acquiring all of the outstanding shares of InterOil Corporation (InterOil) in exchange for shares of Exxon, valued at $45 per share, plus a capped "contingent resource payment" (the Exxon Arrangement).[251]

At the Yukon Supreme Court, the chambers judge concluded that the process undertaken by InterOil's board of directors in connection with the Exxon Arrangement had demonstrated "deficient corporate governance and inadequate disclosure."[252] However, the fact that a substantial majority of InterOil shareholders still voted in favour of the arrangement, despite the clear deficiencies in both Morgan Stanley's fairness opinion and the accompanying circular sent to InterOil's shareholders, was held to be sufficient grounds to conclude that the arrangement was fair.[253]

On appeal, the dissenting shareholder asserted that InterOil failed to provide meaningful disclosure of the potential value of the company's assets and the financial impact and associated risks of the cap on the contingency payment.[254] InterOil conversely argued that the certainty of value provided by the arrangement was in the interests of shareholders, allowing them to also reap some benefits in the future development of InterOil's assets by becoming shareholders of Exxon.[255]

3. DECISION

Justice Newbury focused her analysis on the general guidance provided by the leading jurisprudence on this issue, *BCE*.[256] In *BCE*, the Supreme Court of Canada suggested that when considering the fairness of a plan of arrangement, courts should consider the following: (1) whether the arrangement is objectively fair and reasonable, and "looks primarily to the interests of the parties whose legal rights are being arranged";[257] (2) the terms and impact of the arrangement itself, rather than the process by which it was reached;[258] (3) the business judgment test;[259] (4) delving beyond the question of whether a reasonable business person would approve of the plan;[260] (5) whether there is a positive value provided to the corporation that offsets the fact that the rights are being altered;[261] (6) the valid purpose or necessity of the arrangement to the continued operation of the corporation;[262] (7) applying requisite

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249 RSY 2002, c 20.
250 *Interoil*, *supra* note 248 at para 1.
251 *Ibid*.
252 *Ibid* at para 18.
253 *Ibid* at paras 23–24.
254 *Ibid* at para 31.
255 *Ibid* at para 32.
256 *Supra* note 229.
257 *Ibid* at para 119.
258 *Ibid* at para 136.
259 *Ibid* at para 139.
260 *Ibid* at para 141.
261 *Ibid* at para 145.
262 *Ibid* at para 146.

caution to arrangements that are not mandated by the corporation's financial or commercial situation;[263] (8) whether or not the arrangement strikes a fair balance, having regard to the interests of the corporation and the circumstances of the case;[264] and (9) any other indicia that may be relevant to such a determination, including things such as whether a majority of shareholders voted to approve the plan.[265]

Justice Newbury concluded that when approving such arrangements, courts must satisfy themselves that "the shareholders were in a position to make an *informed choice*, both as to the value they would be giving up, and the value they would be receiving" as a result of the plan of arrangement.[266] Focusing primarily on the choice of Morgan Stanley's fairness opinion to not attribute value to the potential worth of InterOil's primary assets, as well as the fact that Morgan Stanley's remuneration for the opinion was based on the success of the arrangement, Justice Newbury found that the utility of this opinion was undermined.[267] Furthermore, despite appointing a committee to oversee the negotiation of the proposed transaction, in reality the committee was largely passive and deferred to the recommendations of a conflicted management team.[268] Overall, Justice Newbury held that the circumstances of this transaction required that InterOil seek independent advice as to the transaction's overall financial fairness.[269]

InterOil's failure to provide its shareholders with an independent opinion regarding the fairness of the transaction made it such that the shareholders' ultimate decision was based on information or advice that was inadequate, not objective, and undermined by conflicts of interest.[270] Justice Newbury was not persuaded by InterOil's argument that Exxon's offer had been the result of a competitive bidding process, and that Exxon's bid was superior to bids that were submitted and initially accepted from other companies.[271] The application for approval of the plan of arrangement was denied.[272]

4. COMMENTARY

This decision calls into question the standard practice for fairness opinions and potentially imposes new requirements on merging corporations. Fairness opinions are not required by law, but this ruling suggests that a fairness opinion should be more than merely a "comfort letter" for boards looking to bolster their decision. An investment bank's choice to not attribute value to an aspect of a transaction in its fairness opinion may prompt a court to find that the shareholders were not in a position to make an informed choice about the plan of arrangement. The decision also warns against engaging a bank in this context on the basis of a success fee.

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263 *Ibid*.
264 *Ibid* at para 148.
265 *Ibid* at para 152. These nine indicia are enumerated in *InterOil*, *supra* note 248 at para 29.
266 *InterOil*, *ibid* at para 33 [emphasis in original].
267 *Ibid* at para 34.
268 *Ibid* at para 35.
269 *Ibid* at para 36.
270 *Ibid* at para 40.
271 *Ibid* at para 42–43.
272 *Ibid* at paras 44–45.

Exxon was subsequently successful in purchasing InterOil by virtue of Justice Veale's decision in *Re: Interoil Corporation*.[273] A new iteration of the plan of arrangement was put forward that included Exxon agreeing to a contingent increase in the purchase price and InterOil hiring another financial adviser, BMO Capital Markets, to conduct the fairness opinion.

The new fairness opinion was more detailed than what is standard practice, including valuation methodologies used and an analysis of the consideration to be paid to shareholders. Additionally, it was conducted on a flat-fee basis. Justice Veale observed that it addressed the deficiencies of the previous fairness opinion and, notably, suggested that it provided "a useful template for the detail that Fairness Opinions should provide to shareholders and to courts."[274]

C. *SMOOTHWATER CAPITAL CORPORATION V. MARQUEE ENERGY LTD.*[275]

1. BACKGROUND

Smoothwater Capital is an appeal of an Alberta Court of Queen's Bench decision granting an application for amendment of a preliminary order to provide that certain shareholders of Alberta Oilsands Inc. (Alberta Oilsands) had the right to vote, and potentially dissent, on the proposed arrangement of Marquee Energy Ltd. (Marquee).

2. FACTS

Alberta Oilsands held a number of oil sands leases that were cancelled by the Alberta government, resulting in a compensation payout to Alberta Oilsands.[276] Marquee owned a number of conventional oil and gas assets but lacked the liquidity to develop them.[277] Consequently, "[a] business plan was developed whereby Alberta Oilsands and Marquee would be combined together, and Alberta Oilsands's cash would be used to develop Marquee's assets."[278] Smoothwater Capital Corporation (Smoothwater), which held 15 percent of the capital stock in Alberta Oilsands, opposed the business plan and preferred to see Alberta Oilsands liquidated.[279]

Initially, Alberta Oilsands and Marquee were to amalgamate under the Alberta *Business Corporations Act*.[280] However, this would require a vote of the shareholders of both companies.[281] If the shareholders approved the amalgamation, the dissenting shareholders would be entitled to be bought out at the "fair value" of the shares.[282] If the shareholders approved the amalgamation, Smoothwater would likely dissent and the capital used to pay

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273 2017 YKSC 16, 2017 YKSC 16 (CanLII).
274 *Ibid* at para 18.
275 2016 ABCA 360, 405 DLR (4th) 573 [*Smoothwater Capital*].
276 *Ibid* at para 3.
277 *Ibid* at para 4.
278 *Ibid.*
279 *Ibid* at paras 3–4.
280 RSA 2000, c B-9 [*ABCA*].
281 *Smoothwater Capital*, *supra* note 257 at para 5.
282 *ABCA*, *supra* note 280, ss 191(1)(c), 191(3).

out the dissenting shareholders would undermine the objective of using the funds to develop Marquee's assets.[283] As such, it was resolved that the transaction would proceed by arrangement under section 193 of the *ABCA*.[284]

3. DECISION

BCE is the leading case on approving plans of arrangement and provides that to approve a plan of arrangement, a court must find that it is "fair and reasonable" by balancing the interests of various stakeholders.[285] The Court of Appeal determined that the "fair and reasonable" test can properly be applied prior to the final approval of the arrangement.[286]

The Court of Appeal rejected Smoothwater's argument that its shareholders should be afforded the same rights as the Marquee shareholders on the basis that the *ABCA* only requires evaluating the arrangement from the perspective of the arranged corporation.[287] The Court further held that although the legal interests of whether an arrangement is "fair and reasonable" is the focus of the test, the economic interests of the affected shareholders are inevitably considered.[288]

The Court highlighted that shareholders elect directors to make decisions on their behalf, and that courts have traditionally deferred to the expertise of the directors in making such decisions.[289] The Court also emphasized the importance of certainty in commercial law.[290] The Court determined that it was not bad faith for the directors to decide to structure a transaction to avoid dissent rights.[291] Allowing Alberta Oilsands to dissent would jeopardize the amalgamated company's liquidity; therefore, the directors had a legitimate reason for structuring the transaction as an arrangement.

4. COMMENTARY

Smoothwater Capital returns certainty to the law surrounding arrangements. In a statement that is undoubtedly reassuring to both lawyers and members of the business community, the Court recognized the need for predictability and judicial consistency in commercial law. The Court restored the long-established approach to arrangements, which recognizes the importance of practicality and flexibility. The decision confirms that the law only requires a shareholder vote of the company being arranged, and that it is not improper or a mark of bad faith to structure a transaction to avoid a shareholder vote of the acquiring company.

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283 *Smoothwater Capital*, *supra* note 275 at para 5.
284 *Ibid* at para 6.
285 *Ibid* at paras 14–15, citing *BCE*, *supra* note 229.
286 *Smoothwater Capital, ibid* at para 26.
287 *Ibid* at para 20, citing *McEwen v Goldcorp Inc* (2006), 21 BLR (4th) 262 (Ont Sup Ct J), aff'd (2006), 21 BLR (4th) 306 (Ont Sup Ct J (Div Ct)).
288 *Ibid* at paras 30–32.
289 *Ibid* at para 41.
290 *Ibid* at paras 46–48.
291 *Ibid* at para 46.

D. *YAIGUAJE V. CHEVRON CORPORATION*[292]

1. BACKGROUND

In *Yaiguaje*, the Ontario Superior Court of Justice dismissed the plaintiffs' action to execute against the shares and assets of Chevron Canada Limited (Chevron Canada) in satisfaction of a judgment of a foreign court. In doing so, the Court reaffirmed principles of corporate separateness and confirmed the high threshold that must be met in order to pierce the corporate veil.

This decision was the result of 47 Ecuadorian residents (the Plaintiffs) seeking recognition and enforcement of a US$9.5 billion judgment rendered against Chevron Corporation (Chevron) by an Ecuadorian court in 2011 (the Ecuadorian judgment).[293] Chevron had no assets in Ecuador, so the Plaintiffs brought an action in Ontario in the hopes of seizing assets in Canada.[294]

Chevron Canada and Chevron initially contested whether the Ontario courts had jurisdiction over the proceeding. These challenges were resolved in September 2015 when the Supreme Court of Canada upheld the Ontario Court of Appeal decision that the Ontario courts had jurisdiction over the action for recognition and enforcement of the foreign judgment against Chevron where Chevron Canada was also named as a defendant.[295] The case was remitted to the Ontario Superior Court of Justice.

2. FACTS

> The dispute underlying the Ecuadorian judgment originated in the Oriente region of Ecuador. This oil-rich area attracted exploitation and extraction activities by oil companies, including Texaco Inc., from 1964 to 1992. As a result of these activities, the region suffered extensive environmental pollution that seriously disrupted the lives of its residents. The 47 plaintiffs in [the] proceeding represent[ed] approximately 30,000 indigenous Ecuadorian villagers who live in the region and who have been affected by the environmental pollution.[296]
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> …
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> The plaintiffs commenced proceedings against Chevron in Ecuador in 2003. By then Texaco [Inc.] had merged with Chevron.[297]

By way of background, Chevron is a public Delaware corporation with a principal business of holding shares in subsidiary corporations and managing those investments.[298] The Court noted it "has approximately 1,500 indirect subsidiaries operating in approximately 60

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292 2017 ONSC 135, 410 DLR (4th) 409 [*Yaiguaje*].
293 *Ibid* at para 5.
294 *Ibid* at para 14.
295 See *Chevron Corp v Yaiguaje*, 2015 SCC 42, [2015] 3 SCR 69.
296 *Yaiguaje*, *supra* note 295 at para 6.
297 *Ibid* at para 8.
298 *Ibid* at para 9.

countries in the world."[299] Chevron Canada, on the other hand, "is a seventh level, indirect subsidiary of Chevron."[300] The two corporations "have separate and independent boards of directors, and none of the Chevron directors or executive officers serve on the board or are involved in managing the operations of Chevron Canada."[301]

Moreover, Chevron Canada had no connection to the legal proceedings in Ecuador that led to the Ecuadorian judgment.[302] Chevron Canada's major business activities involve petroleum and natural gas exploration in Canada and its shares are wholly owned by Chevron Canada Capital Company.[303]

The Plaintiffs did not allege that Chevron Canada was a party to the Ecuadorian action, that it was an agent of Chevron, or that there was any wrongdoing by Chevron Canada.[304] Nor did they "allege that the corporate structure of which Chevron Canada is a part was designed or used as an instrument of fraud or wrongdoing."[305]

Instead, the Plaintiffs advanced two main arguments in support of its claim as against Chevron Canada. First, the Plaintiffs argued "that Chevron Canada is an asset of Chevron that is exigible and available for execution and seizure pursuant to the *Execution Act*[306] to satisfy the Ecuadorian judgment against Chevron."[307] Second, and in the alternative, the Plaintiffs argued that the principle of corporate separateness should not apply to shield Chevron Canada's shares and assets from being available to satisfy the Ecuadorian judgment.[308]

Chevron Canada, Chevron, and the Plaintiffs each brought competing motions for summary judgment. At the same time, the Plaintiffs also brought a motion to strike the defences plead by Chevron in its statement of defence, alleging that the defences raised were not permitted defences to an action for recognition and enforcement of a foreign judgment.[309]

3. DECISION

The motions judge rejected the Plaintiffs' arguments relating to the claims made as against Chevron Canada and granted the defendants' motions for summary judgment, dismissing the Plaintiffs' claims against Chevron Canada.

On the first argument, the Court held "that the *Execution Act* does not make Chevron Canada's shares and assets exigible and available for execution and seizure in satisfaction of the Ecuadorian judgment against Chevron, absent a finding that Chevron Canada's

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299 *Ibid* at para 22.
300 *Ibid* at para 10.
301 *Ibid* at para 21.
302 *Ibid* at para 11.
303 *Ibid* at paras 12–13.
304 *Ibid* at para 16.
305 *Ibid* at para 17.
306 RSO 1990, c E.24.
307 *Yaiguaje*, *supra* note 285 at para 25.
308 *Ibid*.
309 *Ibid* at paras 1–2.

corporate veil should be pierced for this purpose."[310] The Court stated that "a parent corporation does not beneficially own the property of its wholly-owned direct subsidiary, let alone an indirect subsidiary such as Chevron Canada."[311] In reaching its conclusion that the *Execution Act* does not give Chevron any interest in the shares or assets of Chevron Canada, the Court noted that if the *Execution Act* applied under these circumstances, the assets of Ontario subsidiaries would always and automatically be subject to execution orders to satisfy judgments against their parent companies.[312] The Court agreed with Chevron's submission that "[t]his result [would] not only [be] contrary to law, it would have startling and stark consequences for Ontario's businesses and their ability to attract investment."[313]

On the second argument, the Court noted that the principle of corporate separateness provides that shareholders of a corporation are not liable for the corporation's obligations and that the corporation's assets are owned exclusively by the corporation, not by its shareholders.[314] The Court reaffirmed the two elements that must be established to pierce the corporate veil: complete domination and control of the subsidiary corporation and wrongdoing akin to fraud in the establishment or use of the corporation.[315] The Court found that the Plaintiffs failed to establish either element in this case. Additionally, the Court rejected the Plaintiffs' argument that there is an independent "just and equitable" exception to the principle of corporate separateness.[316]

In respect of the Plaintiffs' motion to strike the defences plead by Chevron in its statement of defence, the Court considered whether the facts as pleaded were manifestly incapable of being proven and "whether the defences pleaded constitute[d] the defences of fraud, public policy, [or] denial of natural justice."[317] The Court concluded that, with certain exceptions, the defences raised constituted permissible pleadings.

4. COMMENTARY

Yaiguaje confirms the fundamental principle of corporate separateness in Canadian law. The previous Supreme Court decision that granted jurisdiction to Ontario in the matter raised concerns that international companies would face an increased risk of litigation against Canadian assets. This ruling allays some of those concerns and reaffirms the very high threshold that will have to be met before a court will pierce the corporate veil. The decision also reminds debtors that the *Execution Act* is a procedural statute and does not create any rights in property, but merely provides for the seizure and sale of property in which a judgment-debtor already has a right or interest.

The Superior Court of Justice (Divisional Court) has refused the Plaintiffs' leave to appeal.[318]

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310 *Ibid* at para 49.
311 *Ibid* at para 44.
312 *Ibid* at para 48.
313 *Ibid*.
314 *Ibid* at para 60.
315 *Ibid* at para 64.
316 *Ibid* at para 66.
317 *Ibid* at para 97.
318 See *Yaiguaje v Chevron Corporation*, 2017 ONSC 2251, 2017 ONSC 2251 (CanLII).

E. *LIGHTSTREAM RESOURCES LTD. (RE)*[319]

1. BACKGROUND

In *Re Lightstream*, Justice Macleod confirmed that the Alberta Court of Queen's Bench has the jurisdiction to provide relief from oppressive conduct even if a business is undergoing restructuring under the protection of the *Companies' Creditors Arrangement Act*.[320] Further, this case illustrates that the Court's ability to grant this equitable remedy is circumscribed by the overarching purpose and scheme of the *CCAA*.

2. FACTS

Lightstream Resources Ltd. (Lightstream) is a light oil-focused exploration and production company, operating primarily in Alberta and Saskatchewan. In July 2015, in response to continued low commodity prices, Lightstream entered into a privately negotiated agreement with certain holders of its unsecured notes (the Exchange Parties) to issue secured notes in exchange for their unsecured notes and additional capital (the Exchange). The proceeds were then used to reduce borrowing under Lightstream's credit facility.[321] Under the terms of the Exchange agreement, $465 million of unsecured notes were exchanged for $395 million of secured second lien notes, and an additional $200 million of secured notes were issued.[322] The transaction was viewed positively by the company as it provided additional liquidity and financial flexibility to withstand the low oil price environment.[323]

Following the Exchange, certain unsecured noteholders, namely FrontFour Capital Corp (FrontFour) and Mudrick Capital Management (Mudrick), alleged that between February and July 2015, Lightstream made a series of representations to the effect that if any such note exchange transaction were undertaken, it would be offered to all unsecured noteholders on equal terms.[324] The plaintiffs commenced actions in July 2015, claiming, among other things, that it was oppressive and improper for Lightstream to have offered the note exchange transaction exclusively to the Exchange Parties, particularly in light of the misrepresentations by Lightstream's management team leading up to the Exchange.[325]

The primary remedy sought by the plaintiffs to rectify the alleged oppression was a court order compelling Lightstream to allow the plaintiffs to participate in the Exchange on the same terms as the Exchange Parties, pursuant to section 242(3)(e) of the *ABCA*.[326]

In September 2016, before the oppression claims could be adjudicated, Lightstream sought protection under the *CCAA*.[327] This raised significant questions regarding: (1) whether the *CCAA* Court had the jurisdiction to determine oppression claims within the *CCAA* process

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319 2016 ABQB 665, 41 CBR (6th) 204 [*Re Lightstream*].
320 RSC 1985, c C-36 [*CCAA*].
321 *Re Lightstream*, *supra* note 319 at para 34.
322 *Ibid*.
323 *Ibid*.
324 *Ibid* at para 20.
325 *Ibid* at para 36.
326 *Supra* note 280; *ibid* at para 37.
327 *Re Lightstream*, *supra* note 319 at para 39.

and to recognize the plaintiffs' claims as secured claims rather than unsecured claims and if there was such jurisdiction within the *CCAA* process; and (2) whether the Court would exercise its discretion to award the remedy sought by the plaintiffs in the context of this insolvency.[328] Lightstream brought an application to resolve these two questions on a threshold or summary basis.[329]

3. DECISION

Justice Macleod determined that, due to the time sensitive nature of these proceedings, the case would be handled similarly to an application for summary judgment.[330] As a result, Justice Macleod made it clear he would be approaching his decision based on determining whether or not there was a "genuine issue to be tried or whether the plaintiffs [were] bound to fail."[331] Justice Macleod noted that the *CCAA* is a broadly worded, remedial piece of legislation.[332] In particular, he cited section 11 of the *CCAA*, which allows the court to make any order that it considers "appropriate in the circumstances."[333] Justice Macleod noted that "appropriateness" in the context of section 11 of the *CCAA* is assessed by determining whether or not an order would advance the policy objectives underlying the *CCAA*, namely to avoid social and economic loss that would result from the liquidation of an insolvent company.[334] This applies to the availability of the oppression remedy under the *CCAA*, which at section 42 allows for the import of remedies from other statutory schemes.[335]

Application of the oppression remedy is guided by the two part framework dictated by the Supreme Court in *BCE*,[336] which provides as follows: (1) does the evidence support the reasonable expectation asserted by the claimant; and (2) does the evidence establish that the reasonable expectation was violated by conduct, and falls within the terms "oppression," "unfair prejudice" or "unfair disregard" of a relevant interest?[337]

The claimant must identify that the expectation they held was reasonable in the circumstances[338] as explained in the case of *BCE*; factors to consider include things such as general commercial practice, the nature of the corporation, the relationship between the parties, past practice, steps the claimant could have taken to protect himself, any representations and agreements, and the fair resolution of conflicts between corporate stakeholders.[339]

Justice Macleod also considered the three governing principles regarding the oppression remedy outlined in *Shefsky v. California Gold Mining Inc.*,[340] which are as follows: (1) not

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328 *Ibid* at para 5.
329 *Ibid* at para 39.
330 *Ibid* at paras 40–42.
331 *Ibid* at para 42.
332 *Ibid* at para 45.
333 *Ibid* at para 47.
334 *Ibid* at para 48, citing *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60, [2010] 3 SCR 379 at para 70.
335 *Re Lightstream*, *ibid* at para 52.
336 *Supra* note 229.
337 *Re Lightstream*, *supra* note 319 at para 56, citing *BCE*, *ibid* at para 68.
338 *Re Lightstream*, *ibid* at para 58.
339 *Ibid* at para 59.
340 2016 ABCA 103, 399 DLR (4th) 290.

every reasonable expectation will give rise to a remedy because there must be some wrongful conduct, causation, and compensable injury to successfully ground a claim for oppression; (2) the oppression remedy cannot be used to advance the personal interests of shareholders, officers or directors, but instead can only be used to protect such people's interests as shareholders, officers, or directors; and finally (3) if the directors have made a decision that is reasonable, the court should not second-guess their business judgment.[341]

Applying these guiding principles to the case in question, Justice Macleod first analyzed whether or not Mudrick and FrontFour's expectation, derived from Lightstream's representations and their agreement with Lightstream, was reasonable. Justice Macleod concluded that based on the evidence he could not conclude that the plaintiffs were bound to fail on this issue, and that the existence of a reasonable expectation and whether that expectation caused a loss were genuine issues for trial.[342]

With respect to the second element required to ground a claim for oppression, whether the evidence establishes that Lightstream's conduct fell within the terms "oppression," "unfair prejudice," or "unfair disregard" of a relevant interest, Justice Macleod held that this determination was dependent on the related question of whether or not going forward with the Exchange was a good faith business decision with a view to the best interests of the corporation.[343] Lightstream had a number of reasons to proceed with the Exchange on an exclusive basis. The Exchange Parties held more than half of the outstanding unsecured notes and had made it clear they would only go forward with the Exchange if it was offered exclusively to them.[344] Further, Lightstream's financial advisors had informed Lightstream that the Exchange would provide them with much needed liquidity.[345] Finally, evidence showed that Lightstream's management team had considered whether or not they were under any legal obligation to offer the Exchange to others, and had concluded they were not.[346]

Based on these factors, Justice Macleod concluded that there was no reason to second-guess the business judgment of Lightstream's management team.[347] However, Justice Macleod still concluded that this was a genuine issue for trial, as he could not conclusively determine whether or not the board of directors of Lightstream were made aware of the fact that Mudrick and FrontFour had been repeatedly assured by Lightstream that they would be included in any exchange.[348]

Lastly, Justice Macleod analyzed whether or not, even if an oppression remedy were granted in these circumstances, forcing Lightstream to offer the Exchange to Mudrick and FrontFour would be an appropriate remedy in light of the overarching remedial purpose of the *CCAA*.[349] Given the precarious financial circumstances of Lightstream, Justice Macleod

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341 *Re Lightstream*, *supra* note 319 at para 57, citing *ibid* at para 22.
342 *Re Lightstream*, *ibid* at para 73.
343 *Ibid* at paras 74–82.
344 *Ibid* at para 81.
345 *Ibid*.
346 *Ibid*.
347 *Ibid* at para 82.
348 *Ibid*.
349 *Ibid* at paras 83–84.

ultimately concluded that an order directing Lightstream to incur further debt would be contrary to the scheme of the *CCAA*.[350]

The remedy requested by Mudrick and FrontFour of recognizing their unsecured claims as secured claims was deemed inappropriate. The appropriate remedy in this case would be damages. This is due primarily to the fact that both plaintiffs adamantly maintained that if they had known about the Exchange they would have sold their notes.[351] An award of damages would compensate the plaintiffs for their loss, as investments have no intrinsic value beyond their financial return.[352]

4. COMMENTARY

Leave to appeal this decision was refused.[353] Justice Wakeling of the Alberta Court of Appeal found that the plaintiffs' likelihood of prevailing on appeal was "extremely low."[354] The order requested by the plaintiffs would unjustifiably diminish the benefits negotiated by the Exchange Parties and harm the interests of other unsecured noteholders who were not alleged to have acted in any blameworthy manner.[355] The remedy requested by the plaintiffs was also inappropriate because, among other things, it would force the company to "assume debt against its wishes."[356]

Most importantly, however, Justice Wakeling found that an appeal would undermine the proposed restructuring. Leave to appeal would introduce a level of uncertainty at the final stages of the restructuring process, which would conflict with the underlying purpose of the *CCAA*, namely the successful restructuring of the debtor company's debt obligations in as short a time as possible.[357] This reinforced Justice Macleod's findings that furtherance of the remedial purpose of the *CCAA* is the guiding principle when exercising discretion in a restructuring proceeding.

This case affirms that the oppression remedy can be used as a tool for crafting remedies in the *CCAA* in appropriate circumstances. This is in keeping with the recent decision in *U.S. Steel Canada Inc. Re*,[358] in which the Ontario Court of Appeal held that an exercise of discretion pursuant to section 11 of the *CCAA* requires a determination of whether the order will further the remedial purposes of the *CCAA*.

In *Re Lightstream*, the Court found that the circumstances identified were not appropriate for the exercise of its discretion. Whether different circumstances would permit access to the broad remedies available in an oppression action in the context of the *CCAA* remains to be seen.

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350 *Ibid* at para 85.
351 *Ibid* at para 86.
352 *Ibid*.
353 See *Mudrick Capital Management LP v Lightstream Resources Ltd*, 2016 ABCA 401, 43 CBR (6th) 175.
354 *Ibid* at para 16.
355 *Ibid* at para 17.
356 *Ibid* at para 18.
357 *Ibid* at para 21.
358 2016 ONCA 662, 402 DLR (4th) 450.

It is clear, however, that where oppression actions intersect with the *CCAA*, they can be adjudicated as part of the *CCAA* process. The *CCAA* context will inform any remedies awarded for oppression, thereby ensuring the furtherance of a potential restructuring.

V. EMPLOYMENT AND LABOUR

A. *WILSON V. ATOMIC ENERGY OF CANADA LTD.*[359]

1. BACKGROUND

Wilson deals with the effect of the *Canada Labour Code*[360] on the ability of federally regulated employers to dismiss their employees without cause. Ultimately, the majority of the Supreme Court of Canada found that under the *Code*, an employee that is dismissed without cause but paid severance or given adequate notice is still entitled to seek the remedies for unjust dismissal provided under the *Code*.

The decision also highlights an interesting debate within the Supreme Court about the circumstances in which a reviewing court should defer to the reasons of administrative decision-makers (such as a labour arbitrator, as in *Wilson*) as opposed to considering such decisions on a correctness standard.

2. FACTS

Joseph Wilson worked for Atomic Energy Canada Limited (AECL) for four and a half years until he was dismissed in November 2009.[361] He had a clean disciplinary record.[362] Wilson filed an unjust dismissal claim under section 240(1) of the *Code*.[363] AECL contended that while Wilson was dismissed without cause, he was provided a significant severance package and therefore his claim for unjust dismissal should be dismissed.[364]

A labour adjudicator heard the complaint and held that an employer could not resort to severance payments, however generous, to avoid a determination under the *Code* about whether or not dismissal was just.[365] As a result, Wilson's complaint was allowed to proceed.[366]

AECL sought judicial review before the Federal Court, which overturned the adjudicator's decision, finding that nothing in the *Code* precluded employers from dismissing non-unionized employees on a without-cause basis.[367] This decision was subsequently upheld at the Federal Court of Appeal.

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359 2016 SCC 29, [2016] 1 SCR 770 [*Wilson*].
360 RSC 1985, c L-2 [*Code*].
361 *Wilson*, *supra* note 359 at para 8.
362 *Ibid*.
363 *Ibid* at para 9.
364 *Ibid*.
365 *Ibid* at para 13.
366 *Ibid*.
367 *Ibid* at para 14.

3. DECISION

By a 6-3 decision, the Supreme Court reinstated the holding of the adjudicator. The Supreme Court held that the provisions of the *Code* were intended to prevent federally regulated employers from terminating employees without cause, regardless of whether they have paid adequate severance pay.[368]

While at common law, a non-unionized employee could be dismissed without cause if the employee was given reasonable notice or pay in lieu of notice, this has been displaced by the *Code*.[369] Therefore, allowing employers to pay severance in lieu of such protection would undermine the purpose of the *Code*.[370]

Justice Abella noted that the purpose of the 1978 amendments to the *Code*, namely the addition of provisions governing employee recourse for unjust dismissal, was to provide "a statutory alternative to the common law of dismissals [that] conceptually align[s] the protections from unjust dismissals for non-unionized federal employees with those available to unionized employees."[371] As a result of these new provisions, the notice and severance requirements imposed under sections 230(1) and 235(1) of the *Code* have been limited to apply only in circumstances that fall outside the unjust dismissal provisions.[372] Therefore, where an employee is dismissed without cause, providing the employee with adequate notice or payment in lieu thereof will not prevent the employee from subsequently pursuing a remedy under the unjust dismissal provisions of the *Code*.[373]

In order for a labour adjudicator to determine whether or not the appellant's dismissal was unjust, Justice Abella concluded that it was appropriate for the adjudicator to draw heavily on the interpretations of "just" and "unjust" reflected in collective bargaining jurisprudence, but to also adjust such jurisprudence appropriately to account for the differences at play in a non-unionized environment.[374] Arbitral jurisprudence acts as a guide for adjudicators to determine what has traditionally been regarded as sufficient or insufficient grounds for just dismissal.[375]

Overall, the purpose of the *Code* is to afford non-unionized employees with a similar level of protection from unjust dismissal as that which is granted to unionized employees. Therefore, the adjudicator's conclusion was found to be "anchored in parliamentary intention, statutory language, arbitral jurisprudence, and labour relations practice."[376] The appellant's action for unjust dismissal, despite the severance pay and notice given to him by AECL, was permitted to proceed.[377]

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368 *Ibid* at para 68.
369 *Ibid* at para 1.
370 *Ibid* at para 39.
371 *Ibid* at para 46.
372 *Ibid* at para 47.
373 *Ibid*.
374 *Ibid* at para 52.
375 *Ibid* at para 58.
376 *Ibid* at para 69.
377 *Ibid*.

Justices Côté and Brown, in dissent, concluded that dismissal without cause will not be held to be unjust per se, so long as adequate notice and severance pay is provided to the employee.[378] The dissent held that in the absence of a clear and unambiguously expressed legislative intention to oust the common law, the common law principles will persist.[379] As a result, the *Code* must be interpreted consistently with the common law.[380]

4. COMMENTARY

The decision may make it more challenging for federally regulated employers to deal with the business realities of managing their workforces. While section 240(1) of the *Code* does not apply to the dismissal of managers, the Supreme Court's pronouncement establishes a legal standard that is very different from the law established on terminating other non-unionized employees in most provinces under the common law (and the civil law in Quebec) and provincial employment standards statutes.

Federally regulated employers should also keep in mind that, although they cannot rely on reasonable notice of dismissal or pay in lieu thereof to indicate that a termination was not unjust, employees may still pursue the common law remedy of reasonable notice or pay in lieu thereof in the civil courts instead of availing themselves of the dismissal provisions found in the *Code*. Further, regardless of any notice or severance paid, the range of remedies, including reinstatement and other equitable relief, will be available to those who bring an unjust dismissal application.

Apart from the significant implications for federally regulated employers, the majority decision confirmed that the "reasonableness" standard of review is presumptively appropriate when specialized adjudicators interpret their governing statutes.[381] Therefore, even where different adjudicators have reached divergent interpretations over time, the courts will not step in to identify which interpretation is "correct." This underscores the courts' ongoing preference to defer to specialized administrative decision-makers on matters within the latter's sphere of expertise.

B. *STYLES V. ALBERTA INVESTMENT MANAGEMENT CORPORATION*[382]

1. BACKGROUND

The Alberta Court of Appeal in *Styles* clarified the law with respect to how long-term incentive plans (LTIP) should be treated when an employee is terminated. In doing so, the Court overturned a trial-level decision that would have greatly expanded the entitlements of employees upon termination of employment, and provided clarity on an employee's post-termination right to long-term incentive payments.

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378 *Ibid* at para 148.
379 *Ibid* at para 129.
380 *Ibid*.
381 *Ibid* at para 40.
382 2017 ABCA 1, 408 DLR (4th) 725 [*Styles*].

2. FACTS

This dispute concerned a claim brought by an employee, David Styles, against his former employer, the Alberta Investment Management Corporation (AIMCo), following the without-cause termination of his employment. Notably, the claim was not related to the amount of notice or pay in lieu thereof to which Styles was entitled, which were clearly governed by the employment contract.[383] Rather, the dispute turned on whether Styles was entitled to the payment of bonuses under AIMCo's LTIP following the termination of his employment.[384]

The LTIP in this case was a relatively standard form document, which provided that grants were allocated to participating employees on a yearly basis, but no rights vested and no bonuses became payable until a four-year period had expired, and participating employees had to be actively employed on the vesting date to be eligible for a bonus.[385] By extension, a participating employee whose employment lasted less than four years and was no longer actively employed by AIMCo on the vesting date would not be entitled to or eligible for a bonus under the LTIP.

Styles had been employed by AIMCo for less than four years at the time his employment was terminated. He demanded the value of his unpaid LTIP amounts from AIMCo on termination, but AIMCo refused, citing the terms of the LTIP. Styles brought an action for such amounts.

3. DECISION

The Alberta Court of Appeal overturned the trial judge's decision, which had awarded Styles $444,205 in damages for lost bonuses under the LTIP.[386] In doing so, it rejected the trial judge's interpretation of the LTIP and dismissed any application of a "common law duty of reasonable exercise of discretionary contractual power."[387]

The central force behind the Court of Appeal's decision was the interpretation of the LTIP itself. The plain meaning of the contract was clear and provided that an employee had no entitlement to a bonus under the LTIP unless he or she was actively employed on the vesting date, that is, after the four-year period had expired.[388] Further, the decision to refuse payment of bonuses under the LTIP was not truly discretionary.[389] A decision to terminate an employee without cause is not properly characterized as an exercise of discretion and an employer need not provide a reasonable basis for such a termination.[390]

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383 *Ibid* at para 41.
384 *Ibid* at para 1.
385 *Ibid* at para 6.
386 *Ibid* at para 15.
387 *Ibid* at para 54.
388 *Ibid* at para 30.
389 *Ibid*.
390 *Ibid* at para 42.

The Court of Appeal went on to emphatically reject the concept of a "common law duty of reasonable exercise of discretionary contractual power."[391] It explained that such a principle was unsupported by established authority and was in fact contrary to established principles of contract law.[392] Parties are free to act in their own self-interest in the commercial context. It is not for courts to examine contracts to determine whether the bargain at issue makes sense or is fair.[393]

In this case, Styles understood what he bargained for when he agreed to employment with AIMCo. Bonuses under the LTIP did not vest for four years. If he wanted access to bonuses under the LTIP in the event that his employment was terminated without cause before the four year period expired, it was "incumbent for him to negotiate such a provision."[394]

4. COMMENTARY

In many ways, this decision is a relief for Alberta employers. The trial decision created some uncertainty as to what an employee with unvested rights under an incentive plan would be entitled to in the event that his or her employment was terminated without cause. Equally, there was a question as to whether employers should develop appropriate contingencies into their practices as a result.

The Court's decision in *Styles* (and the extensive reasoning that accompanied it) has put such questions to rest in Alberta. The plain language of incentive plans will govern the accessibility of such entitlements when employees are terminated without cause. If an employee's rights under an incentive plan have not vested at the time his or her employment is terminated and there is no language to the contrary, he or she will not be entitled to such amounts on termination. The reasoning behind such a principle is clear: parties should get what they contract for, even in the employment context.

The Court criticized the trial judge's interpretation of *Bhasin*,[395] noting that the decision speaks to the performance of the contract, not to the negotiation or terms of the contract: "*Bhasin* did not open up for examination whether the terms of the Long Term Incentive Plan requiring continuous employment on the vesting date were 'fair' or 'reasonable.'"[396] This is further evidence of the judicial trend that narrows the avenue for parties to pursue claims on the basis of good faith obligations.

The Court's emphasis that courts do not have a mandate to examine the content of contracts to determine whether a bargain makes sense consequently places helpful boundaries on the arguments that employees can raise post-termination. In simple terms, as long as employment agreements and associated incentive plans meet statutory minimums and are not otherwise discriminatory, an employee will likely be required to adhere to the bargain he or she agreed to.

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391 *Ibid* at para 54.
392 *Ibid* at para 49.
393 *Ibid* at para 62.
394 *Ibid* at para 65.
395 *Supra* note 159.
396 *Styles*, *supra* note 382 at para 51.

Based on such reasoning, it is prudent for employers to invest time at the outset of an employment relationship to ensure that all of an employee's entitlements are clearly dealt with in the event of termination. As *Styles* demonstrates, clear language will govern, and employers with ambiguous incentive plans run the risk that such plans will be interpreted contrary to their interests moving forward.

VI. ENVIRONMENT

A. *ORPHAN WELL ASSOCIATION V. GRANT THORNTON LIMITED*[397]

1. BACKGROUND

In *Orphan Well Assoc*, the Alberta Court of Appeal upheld Chief Justice Wittmann's decision in *Redwater Energy Corporation (Re)*[398] (the Chambers Decision). The Chambers Decision found that certain sections of the *Oil and Gas Conservation Act*[399] and the *Pipeline Act*[400] are inoperative to the extent that they are used by the Alberta Energy Regulator (AER) to: (1) prevent the abandonment or renunciation of an insolvent debtor's assets by a court-appointed receiver or trustee; and (2) require the trustee to satisfy certain environmental claims outside of the scheme of distribution set out in the *BIA*.[401]

2. FACTS

Redwater Energy Corporation (Redwater) was a publicly listed junior oil and gas producer in Alberta that held a number of properties licensed under the *OGCA* and the *PA*.[402] In May 2015, after Redwater's inability to consummate an out-of-court sale of its assets in order to repay its lender in full, Grant Thornton Limited (GTL) was appointed receiver over the assets of Redwater pursuant to section 243 of the *BIA*.[403] In October 2015, Redwater was assigned into bankruptcy and GTL was named trustee of Redwater's estate.[404]

Upon appointment, GTL conducted an assessment of Redwater's licensed assets and advised the AER that it would only be taking possession of 20 wells, facilities, and associated pipelines.[405] Shortly thereafter, the AER issued closure and abandonment orders in respect of the licensed assets renounced by GTL (the Renounced Assets) and filed an application to compel the receiver to comply with the closure and abandonment orders, and to fulfil all statutory obligations of Redwater in relation to abandonment, reclamation, and remediation of the licensed assets.[406]

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397 2017 ABCA 124, [2017] 6 WWR 301 [*Orphan Well Assoc*].
398 2016 ABQB 278, [2016] 11 WWR 716.
399 RSA 2000, c O-6 [*OGCA*].
400 RSA 2000, c P-15 [*PA*].
401 *Supra* note 189.
402 *Orphan Well Assoc*, *supra* note 397 at para 4.
403 *Ibid*.
404 *Ibid* at para 7.
405 *Ibid* at para 6.
406 *Ibid* at paras 6, 8.

GTL brought a cross-application seeking the approval of a sales process that excluded the Renounced Assets.[407] The cross-application also sought a determination of the constitutionality of the AER's licensing regime under the *OGCA* and the *PA* to the extent that it prevents the receiver from abandoning the Renounced Assets and imposes an obligation on the receiver to expend funds to comply with the abandonment orders as a condition precedent to the AER approving a transfer of Redwater's AER licences.[408]

Chief Justice Wittmann dismissed the AER's application and granted GTL's application to commence a sales process to dispose of Redwater's assets. The AER and the Orphan Well Association (the Appellants) both appealed the Chambers Decision shortly thereafter.[409]

3. DECISION

The majority of the Court of Appeal dismissed the appeal on the basis that the Chambers Decision disclosed no errors and was consistent with the majority decision of the Supreme Court of Canada in *Newfoundland and Labrador v. AbitibiBowater Inc*.[410] Further, the majority of the Court found that the AER's position in respect of end-of-life obligations both engaged the doctrine of paramountcy and frustrated the *BIA*'s purpose.

a. Environmental Claims

One of the primary questions addressed in the Chambers Decision was whether the AER orders were provable claims capable of being compromised under the *BIA*. The primary environmental provisions in the *BIA* are contained in section 14.06, which assumes that the general bankruptcy regime applies to environmental claims other than those covered by the exceptions contained therein. In effect, the Court found that section 14.06 was Parliament's attempt to incorporate environmental claims into the general bankruptcy regime.[411]

Whether an environmental claim will be subject to compromise under the *BIA* depends on the circumstances. "If the environmental obligation is framed in monetary terms, it will qualify as a provable claim."[412] Converseley, "[i]f it is not framed in monetary terms, it must be examined to see whether it will 'ripen into a financial liability,' having regard to the 'factual matrix and the applicable statutory framework.'"[413] In *AbitibiBowater*, the Supreme Court set out a three-part test to assist with this determination:

(1) There must be a debt, liability, or obligation to a creditor;

(2) The debt, liability, or obligation must be incurred at the relevant time in relation to the insolvency; and

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407 *Ibid* at para 8.
408 *Ibid*.
409 *Ibid* at para 9.
410 2012 SCC 67, [2012] 3 SCR 443 [*AbitibiBowater*].
411 *Orphan Well Assoc*, *supra* note 397 at paras 54, 57.
412 *Ibid* at para 60, citing *AbitibiBowater*, *supra* note 410 at paras 2, 30.
413 *Orphan Well Assoc*, *ibid*, citing *AbitibiBowater*, *ibid* at paras 3, 31.

(3) It must be possible to attach a monetary value to the debt, liability, or obligation.[414]

The Alberta Court of Appeal noted four specific points in support of the Chief Justice's determination that the AER orders were provable claims:

(1) An examination of the substance of the regulatory regime indicated that it was irrelevant whether Redwater's obligation to remediate the wells arose directly or indirectly, as the AER's policy on transfers resulted in the stripping away of value from the bankrupt estate to meet the outstanding environmental obligations.[415]

(2) It does not matter which public body actually does the remediation, as in any case, there is a "creditor" with a provable claim in bankruptcy operating under the government's authority.[416]

(3) The determination of whether it is sufficiently "certain" that the remediation work will be done depends on the factual context, but the AER "cannot manage the timing of its intervention in order to escape the insolvency regime."[417]

(4) The effect of the AER's policy on the sale of assets was to "artificially transfer the value of the oil and gas assets to the AER licence, which itself has no intrinsic value."[418] As a result, the Court found that the regulatory technique of placing financial conditions on a transfer of AER licences provided sufficient "certainty" in that it both fixed a monetary value on the obligations, and made certain that the funds will be set aside to perform the remediation.[419]

b. Constitutional Questions

In addition to agreeing that the AER orders were provable claims under the *BIA*, the majority of the Court also found that the current regulatory regime engaged the doctrine of paramountcy to the extent that it required GTL to devote substantial parts of the bankrupt estate in satisfaction of the environmental claims in priority to the claims of the secured creditor.[420]

After careful review, the Court found that the current regime governing the transfer of AER licences is premised on the assumption that there is an obligation outstanding, with the obligation being the actual or potential cost of abandoning the well.[421] The Court found that, for a number of years, the AER had been hindering the disposition of assets in bankruptcy by placing financial preconditions on the transfer of permissive AER licences, thereby

414 *AbitibiBowater*, *ibid* at para 26.
415 *Orphan Well Assoc*, *supra* note 397 at para 77.
416 *Ibid* at para 78.
417 *Ibid* at para 79.
418 *Ibid* at para 81.
419 *Ibid*.
420 *Ibid* at para 91.
421 *Ibid* at para 88.

requiring payment of environmental obligations ahead of the claims of secured creditors, and disrupting the scheme of distribution under the *BIA*.[422]

The Court agreed with the Chief Justice that the AER's licensing scheme was in violation of the "single proceeding" model,[423] and also that the obligations that the AER sought to impose on receivers and trustees were in operational conflict with the provisions of the *BIA* that: (1) exempt a trustee or receiver from personal liability; (2) allow a trustee or receiver to disclaim assets; and (3) govern the priority of remediation costs.[424] Additionally, the Court found that the regime frustrated the federal purpose of managing the winding up of insolvent corporations.[425]

However, the determination of unconstitutionality was limited to those provisions that conflict or frustrate the *BIA*'s purpose. The Court clearly expressed that the AER remains able to control the transfer of AER licences of bankrupt companies, as long as its actions do not disrupt the priority of environmental claims under the *BIA* (including further limiting transfers to qualified transferees).[426]

Justice Martin dissented on these points and held that the *OGCA* and the *PA* did not create an operational conflict or frustrate the *BIA*'s purpose. She found that the current regime was not aimed at the subversion of the scheme of distribution under the *BIA*, and that any incidental effect on distribution was permissible.[427]

4. COMMENTARY

The Court correctly recognized that the Appellants sought to replace the "polluter-pay" system set out in *AbitibiBowater* with a "third-party pay" system, placing the costs of environmental obligations squarely on the shoulders of Redwater's creditors.[428] The Court was cognizant of the purpose of section 14.06 and held that if Parliament had intended that the debtor always satisfy all remediation costs, it would have granted the Crown a priority with respect to the totality of the debtor's assets.[429] This express affirmation of the scheme of distribution under the *BIA*, and the general law of priority of claims, provides certainty that Alberta courts will continue to recognize the rights of secured lenders with properly registered security. Finding otherwise would have the effect of limiting the influx of capital into an industry attempting to recover from an extended downturn.

Of particular note to lenders, the Court found that the industry practice of accounting for outstanding environmental obligations when evaluating the creditworthiness of a potential borrower will not prejudice or result in the subordination of their security in liquidation proceedings under the *BIA*.[430]

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422 *Ibid* at para 84.
423 *Ibid* at para 88.
424 *Ibid* at para 89.
425 *Ibid*.
426 *Ibid* at para 84.
427 *Ibid* at paras 229–45.
428 *Ibid* at para 104.
429 *Ibid* at para 61, citing *AbitibiBowater*, *supra* note 410 at para 33.
430 *Orphan Well Assoc*, *ibid* at paras 97–99.

The AER has indicated that it will seek leave to appeal the Court's decision to the Supreme Court. However, it is unclear what measures the AER will take in the interim to address the effects of the Court's decision, as the AER's response to the Chambers Decision had unintended consequences that significantly disrupted industry.

VII. BUILDERS' LIEN

A. *CHANDOS CONSTRUCTION LTD. V. TWIN PEAKS CONSTRUCTION LTD.*[431]

1. BACKGROUND

In *Chandos Construction*, the Court of Queen's Bench of Alberta clarified the concept of the minor lien fund under the Alberta *Builders' Lien Act*[432] as it relates to liens claimed after a certificate of substantial performance (Certificate) is issued and the major lien fund is paid out. The case is the first reported decision in Alberta dealing directly with this issue.

Sections 18 and 23 of the *BLA* require an owner to hold back 10 percent of each payment due to any contractor or supplier hired to improve its land. This is commonly referred to as the "holdback."

If a Certificate is issued:

- A "major lien fund" is formed by the holdback on payments for work done or materials supplied before the Certificate is issued.[433]

- A "minor lien fund" is formed by the holdback on payments for work done or materials supplied after the Certificate is issued.[434]

If no Certificate is issued, no minor lien fund arises, and the entire holdback forms the major lien fund.

If no liens have been registered, the owner may pay the major lien fund to the contractor 45 days (or in the case of an oil or gas well, 90 days) from the date on which the Certificate is issued, or if no Certificate is issued, from the date on which the contract is completed.[435]

An owner is liable under the *BLA* for no more than the major lien fund and, if it arises, the minor lien fund. An owner may discharge a lien registered by a party it did not contract with directly by paying some or the entire appropriate lien fund into court.

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431 2016 ABQB 296, 38 Alta LR (6th) 414 [*Chandos Construction*].
432 RSA 2000, c B-7 [*BLA*].
433 *Ibid*, s 18.
434 *Ibid*, s 23.
435 *Ibid*, s 27.

2. FACTS

In *Chandos Construction*, a Certificate was issued and posted, and the owner paid the major lien fund to the general contractor, Chandos Construction Ltd. (Chandos). One of Chandos' subcontractors, Twin Peaks Construction Ltd. (Twin Peaks), then registered a lien. The majority of the work that Twin Peaks claimed under its lien was performed before the Certificate was issued (the Lien Claim).[436]

3. DECISION

Master Robertson held that a lien registered for work done before the Certificate was issued can only attach against the major lien fund, not the minor lien fund.[437] As the major lien fund had been paid to Chandos, there was nothing that the Lien Claim could attach to. As a result, the Court directed that Twin Peaks discharge its lien on the condition that the owner pay into court only the amount Twin Peaks claimed for work done after the Certificate was issued.[438]

Master Robertson noted that while Twin Peaks did not have a valid lien for work done before the Certificate was issued, it had other remedies:

(1) Twin Peaks could make a breach of contract claim against Chandos;[439] and

(2) Twin Peaks could claim against Chandos under section 22 of the *BLA*, which provides that when a contractor receives payment from the owner after a Certificate is issued, it holds that payment in trust for any subcontractors or suppliers on the project to whom the contractor owes money.[440]

4. COMMENTARY

Pursuant to *Chandos Construction*, subcontractors and suppliers have 45 days (or in the case of an oil or gas well, 90 days) from the date on which a Certificate is issued to register a lien for work done or materials supplied prior to issuance of the Certificate, even if their work is not yet complete. If this is not done, and the owner pays out the major lien fund, any lien subsequently registered for such work will be invalid.

Owners should therefore consider requiring contractors to issue Certificates, as they can significantly limit owners' liability under the *BLA*. Additionally, owners (or contractors required to remove liens on an owner's behalf) should ensure that, when they apply to pay money into court to remove a lien registered after the Certificate was issued, there is evidence before the court on when the work was performed or the materials supplied, so that they do not pay more than necessary into court.

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436 *Chandos Construction*, *supra* note 431 at paras 6–11.
437 *Ibid* at para 5.
438 *Ibid* at para 35.
439 *Ibid* at para 30.
440 *Ibid* at para 33.

VIII. TAX

A. *CANADA (ATTORNEY GENERAL) V. FAIRMONT HOTELS INC.*[441]

1. BACKGROUND

The Supreme Court overruled *Juliar v. Canada (Attorney General)*,[442] the previous leading Canadian decision on tax rectification, and narrowed the circumstances where equitable rectification will be granted.

2. FACTS

Fairmont Hotels Inc. (Fairmont Hotels) assisted Legacy Hotel REIT (Legacy) in financing the purchase of two other hotels in US dollars.[443] This financing was structured so that it operated on a tax-neutral basis.[444] Fairmont Hotels was later sold and this sale threatened to compromise the ability of the financing structure to provide foreign exchange tax neutrality.[445] In response, the parties developed a plan which allowed Fairmont Hotels, but not its subsidiaries, to hedge itself against exposure to foreign exchange tax liability.[446]

When Fairmont Hotels and Legacy sought to terminate their arrangement, Fairmont Hotels proceeded to do so without fixing the tax neutrality problem for its subsidiaries.[447] Fairmont Hotels redeemed its shares in its subsidiaries by directors' resolutions.[448] The Canada Revenue Agency's audit of Fairmont Hotels' 2007 tax returns revealed the adverse tax consequences.[449] Fairmont Hotels applied for an order of rectification of the directors' resolutions to avoid the liability.[450] Both the Ontario Superior Court of Justice and the Ontario Court of Appeal granted the order.

3. DECISION

The majority of the Supreme Court found that the lower courts had erred in holding that the intention of tax neutrality could support a grant of rectification, and allowed the appeal.

Rectification is an equitable remedy available "where the agreement between the parties was not correctly recorded in the instrument that became the final expression of their agreement."[451] The majority emphasized that "rectification is limited solely to cases where a written instrument has incorrectly recorded the parties' antecedent agreement. [It is unavailable when] parties wish to amend *not the instrument* recording their agreement, but

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441 2016 SCC 56, [2016] 2 SCR 720 [*Fairmont*].
442 (1999), 46 OR (3d) 104 (Sup Ct J), aff'd (2000), 50 OR (3d) 728 (CA) [*Juliar*].
443 *Fairmont*, *supra* note 441 at para 47.
444 *Ibid* at para 4.
445 *Ibid* at para 5.
446 *Ibid*.
447 *Ibid* at para 6.
448 *Ibid*.
449 *Ibid*.
450 *Ibid* at para 7.
451 *Ibid* at para 3.

the agreement itself."[452] "[A] court may not modify an instrument merely because a party has discovered that its operation generates an adverse and unplanned tax liability."[453]

The majority stated, "rectification aligns the instrument with what the parties agreed to do, and not what, with the benefit of hindsight, they should have agreed to do."[454] *Juliar* wrongly expanded the availability of rectification to just such a scenario, as the Court in that case had permitted the plaintiffs to rectify not merely the instrument, but the agreement itself.[455]

The respondents argued that rectification was necessary to avoid unjust enrichment of the Crown.[456] This argument was dismissed because such a concern missed the point of the inquiry, which was "what the taxpayer agreed to do."[457] "*Juliar* erroneously departed from this principle, and in so doing allowed for impermissible retroactive tax planning."[458]

The majority also clarified that the applicable standard of proof to be applied to evidence adduced in support of a grant of rectification is the usual civil standard of a balance of probabilities.[459]

Justice Abella, with Justice Côté concurring, delivered a dissenting judgment that criticized the majority for unduly narrowing the scope of rectification. Justice Abella noted that a "common, continuing, definite, and ascertainable intention to pursue a transaction in a tax-neutral manner has usually satisfied the threshold for granting rectification."[460] The additional requirement that parties identify the precise mechanism by which they intended to achieve tax neutrality unduly raises the threshold.[461]

4. COMMENTARY

While *Fairmont* does not bar rectification as a remedy for unexpected tax liabilities, it significantly restricts when it will be applied by the courts. The decision calls for sufficiently convincing evidence of the true intention for rectification to be available. Parties will necessarily find it difficult to prove that, while they agreed to certain words in a contract, they intended something different at the time. This may be even more difficult when the parties are sophisticated corporations.

The decision emphasizes the importance of careful drafting of agreements and the need to clearly outline the parties' intentions.

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452 *Ibid* at para 13 [emphasis in original].
453 *Ibid* at para 3.
454 *Ibid* at para 19.
455 *Ibid*.
456 *Ibid* at para 24.
457 *Ibid*.
458 *Ibid*.
459 *Ibid* at para 36.
460 *Ibid* at para 45.
461 *Ibid*.

IX. CONSTITUTIONAL

A. *ERNST V. ALBERTA ENERGY REGULATOR*[462]

1. BACKGROUND

In *Ernst*, the Supreme Court considered whether a claim for a remedy under section 24(1) of the *Canadian Charter of Rights and Freedoms*[463] can be barred by a statutory immunity clause.

2. FACTS

Jessica Ernst was an Alberta property owner who alleged that her well water was contaminated as a result of fracking activities. Ernst sued multiple private and public parties, one of which was the AER. She alleged that the AER breached her right to freedom of expression under section 2(b) of the *Charter* "by punishing her for publicly criticizing the [AER and] preventing her … from speaking to key offices within it" for a period of 16 months.[464] Ernst brought a claim for damages under section 24(1) of the *Charter*.[465]

The AER applied to strike the claim on the basis that it was protected by an immunity clause:[466] section 43 of the *Energy Resources Conservation Act*.[467] This provision precludes all claims against the AER arising from actions it takes pursuant to its statutory authority. The lower courts struck Ernst's claim and, on appeal to the Supreme Court, she amended her claim to also challenge the constitutional validity of section 43.[468]

3. DECISION

The Supreme Court ruled 5-4 to dismiss the appeal. The majority found that Ernst had not successfully challenged the validity of section 43 of the *ERCA*.

Justice Cromwell, writing for three of his colleagues, found that section 24(1) damages could *never* be an appropriate remedy for *Charter* breaches by the AER.[469] His decision states that the underlying concern was "how to strike an appropriate balance [between] two important pillars of our democracy: constitutional rights and effective government."[470] The leading case about when *Charter* damages are an appropriate remedy is *Vancouver (City) v. Ward*,[471] in which the Supreme Court held that *Charter* damages will not be appropriate where, for example, "there is an effective alternative remedy or where damages would be

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462 2017 SCC 1, 405 DLR (4th) 244 [*Ernst*].
463 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
464 *Ernst*, *supra* note 462 at para 6.
465 *Ibid* at para 1.
466 *Ibid*.
467 RSA 2000, c E-10 [*ERCA*].
468 *Ernst*, *supra* note 462 at para 2.
469 *Ibid* at para 24.
470 *Ibid* at para 25.
471 2010 SCC 27, [2010] 2 SCR 28.

contrary to the demands of good governance."[472] This is not a closed list of countervailing factors.[473]

In this case, judicial review was available as an alternative and more effective remedy to vindicate *Charter* rights.[474] Good governance concerns are also engaged, as granting *Charter* damages undermines the effectiveness of the AER.[475] Lastly, determining the appropriateness of *Charter* damages against this type of board on a case-by-case basis largely undermines the purposes served by an immunity clause.[476]

Justice Abella, concurring in the result, determined that the Supreme Court should not entertain the constitutional argument in the absence of a full evidentiary record.[477] However, she noted that it is likely that *Charter* damages would not be an "appropriate and just" remedy against the AER.[478]

The minority found that it was not plain and obvious that *Charter* damages could not be an appropriate and just remedy in these circumstances; nor was it plain and obvious that section 43 barred Ernst's claim, because it is arguable that the punitive acts she alleged fell outside the scope of immunity.[479]

4. COMMENTARY

Ernst supports the general immunity of quasi-judicial administrative bodies from claims for damages, including *Charter* damages. However, the precedential value of the case is uncertain as the Supreme Court was plainly divided on the issues. More than anything, it emphasizes the importance of giving proper notice of a constitutional challenge and proceeding on a full evidentiary record.

B. *SYNCRUDE CANADA LTD. V. CANADA (ATTORNEY GENERAL)*[480]

1. BACKGROUND

Syncrude Canada Ltd. (Syncrude) appealed the Federal Court's decision that section 5(2) of the *Renewable Fuels Regulations*,[481] which requires all diesel fuel produced, imported, or sold in Canada contain at least 2 percent renewable fuel, was intra vires the Parliament's criminal law power.

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472 *Ernst*, *supra* note 462 at para 26, citing *ibid*.
473 *Ernst*, *ibid* at para 28.
474 *Ibid* at para 41.
475 *Ibid* at para 46.
476 *Ibid* at para 56.
477 *Ibid* at para 113.
478 *Ibid* at para 123.
479 *Ibid* at para 133.
480 2016 FCA 160, 398 DLR (4th) 91 [*Syncrude Canada*].
481 SOR/2010-189 [*RFRs*].

2. FACTS

Syncrude "produces diesel fuel at its oil sands operations in Alberta, which [is used] in its vehicles and equipment."[482] The *Canadian Environmental Protection Act, 1999*[483] provides that it is an offence, punishable by a $500,000 to $6,000,000 fine, for failing to adhere to fuel requirements promulgated under the *RFRs*.[484] Syncrude challenged the constitutional validity of the fuel requirements under the *RFRs* on the following basis: (1) the *RFRs* are not a valid exercise of the federal criminal law power; and (2) the *RFRs* are an economic measure that intrude on the provincial responsibility of natural resources.[485]

3. DECISION

Justice Rennie, for a unanimous Court, delivered the judgment. The *RFRs* were found to be constitutional and a valid exercise of federal power.

a. Standard of Review

With respect to questions of constitutionality, "the standard of review is correctness."[486] In order to support a finding that the *RFRs* were not lawfully enacted, the "regulations must be 'irrelevant', 'extraneous' or 'completely unrelated' to the statutory purpose."[487] As such, the issue of whether section 5(2) of the *RFRs* is constitutional was reviewed on the standard of correctness, and whether the *RFRs* were validly enacted was reviewed on a "standard of inconsistency with the enabling statute."[488]

b. Criminal Law Power

Justice Rennie found that in order to determine if the impugned legislation is ultra vires the criminal law power granted to the federal government under the *Constitution Act, 1867*,[489] the pith and substance of the legislation must be considered by looking at both the provision itself and how the provision fits within the context of the broader statute.[490] In conducting this analysis, the unanimous Federal Court of Appeal determined that the 2 percent renewable fuel requirement is aimed at the reduction of toxic substances in the atmosphere, so as to maintain the health of Canadians and protect the environment.[491] The Supreme Court of Canada has consistently held that protection of the environment is a legitimate use of the federal government's criminal law power.[492]

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482 *Syncrude Canada, supra* note 480 at para 1.
483 SC 1999, c 33 [*CEPA*].
484 *Ibid*, ss 139, 272(1).
485 *Syncrude Canada*, *supra* note 480 at para 20.
486 *Ibid* at para 26.
487 *Ibid* at para 27.
488 *Ibid* at para 30.
489 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.
490 *Syncrude Canada*, *supra* note 480 at paras 35, 38.
491 *Ibid* at paras 41–42.
492 *Ibid* at para 49.

The Court rejected Syncrude's argument that the *RFRs* are ineffective and would not reduce greenhouse gas emissions (GHGs).[493] Although the practical effect of legislation is relevant for determining the pith and substance of the impugned provision, Syncrude's argument attempted to circumvent the well-established legal principle that efficacy of a statute is not relevant.[494] The Court also rejected Syncrude's argument that the *RFRs* are not a valid exercise of the criminal law power because the *RFRs* do not stipulate a blanket prohibition on GHGs.[495] The Court held that there is no "constitutional threshold of harm that must be surpassed before the criminal law power is met, provided there is a reasonable apprehension of harm."[496]

c. Colourability

The fact that the *RFRs* have favourable economic consequences in the agricultural sector and create a market for renewable fuel is not inconsistent with the *RFRs*' dominant purpose to reduce GHGs, and does not negate the valid exercise of the criminal law power.[497] The Court held that the ancillary effect of the *RFRs* on the agricultural sector did not amount to colourability, but rather was a necessary means to accomplish the intent of the *RFRs*: namely, reducing GHGs.[498] The Court held that the *RFRs* are not an intrusion into the provincial domain; however, if such a determination was incorrect, the Court further held that the *RFRs* would be saved by the ancillary powers doctrine so that both the federal and provincial governments are entitled to legislate with respect to the environment.[499]

4. COMMENTARY

This decision is significant because of its ramifications on the efficacy of federal climate change policy-making. The Court's holding enables the federal government to enact legislation aimed at reducing GHGs; essentially, the federal government has the power to further its climate change initiatives through legislation.

The fact that such legislation may achieve its goals through the market does not necessarily make it ultra vires. The Court powerfully rejected Syncrude's argument that the dominant purpose of the *RFRs* was to create a market in renewable fuels, stating that "GHGs are harmful to both health and the environment and as such, constitute an evil that justifies the exercise of the criminal law power."[500] The Court further noted that the environment and economy are intimately connected and "it is practically impossible to disassociate the two."[501] The decision will likely embolden the federal government to take further legislative steps, which may include schemes that have implications on the economy.

493 *Ibid* at paras 52–53, 59.
494 *Ibid* at paras 58–60.
495 *Ibid* at para 77.
496 *Ibid* at para 75.
497 *Ibid* at paras 63, 69–70.
498 *Ibid* at paras 89, 92.
499 *Ibid* at para 94.
500 *Ibid* at para 62.
501 *Ibid* at para 66.

X. PUBLIC UTILITIES

A. *TRANSCANADA ENERGY LTD. V BALANCING POOL*[502]

1. BACKGROUND

In *TransCanada Energy*, TransCanada Energy Ltd. (TCE) and ASTC Power Partnership (ASTC) brought an application by way of Amended Originating Notice for the appointment of arbitrators pursuant to section 19.4(a) of the Power Purchase Arrangements (PPAs).[503] The Balancing Pool (the Pool) brought a cross-application to stay the three proposed arbitrations requested by TCE and ASTC pursuant to the Notices of Arbitration.[504]

In addition to this application, there were two related actions before the Court: *Alberta (Attorney General) v. Alberta Power (2000) Ltd.*[505] (the AG Application) and *ENMAX PPA Management Inc. v. Balancing Pool*.[506] The AG Application involved a question of law; namely, the meaning of the phrase "or more unprofitable."[507]

2. FACTS

The PPAs are legislative instruments enacted though the *Power Purchase Arrangements Determination Regulation*.[508] The PPAs provide for termination provisions which allow TCE and ASTC to terminate the PPAs when an "extraordinary event" occurs as defined in the *Balancing Pool Regulation*.[509] TCE and ASTC argue that a change in law arising from changes to the *Specified Gas Emitters Regulation*[510] has rendered the PPAs "unprofitable or more unprofitable" and is an "extraordinary event" giving rise to a termination right under the PPAs.[511] As such, TCE and ASTC submitted Notices of Termination of the PPAs to the Pool.[512]

Upon notice of termination of the PPAs to the Pool, TCE, ASTC, and the Pool engaged in a series of correspondence. The Pool provided notice that it would be commencing an investigation into the "extraordinary events" claim.[513] TCE and ASTC advised that they considered there to be a "deemed dispute" with respect to the change in law and issued dispute notices under the PPAs.[514] When the matter was not resolved in the five day period set forth in the PPAs, TCE and ASTC appointed the first arbitrator pursuant to section 19.4(a) of the PPAs.[515] The Pool refused to appoint the second arbitrator on the basis that it

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502 2016 ABQB 658, 2016 ABQB 658 (CanLII) [*TransCanada Energy*].
503 *Ibid* at para 1.
504 *Ibid* at para 2.
505 2017 ABQB 195, 2017 ABQB 195 (CanLII) [*Alberta Power*]
506 2017 CarswellAlta 878 (WL Can) (QB); *TransCanada Energy*, *supra* note 502 at para 3.
507 *Alberta Power*, *supra* note 505 at para 5.
508 Alta Reg 175/2000.
509 Alta Reg 158/2003, s 1(d).
510 Alta Reg 139/2007.
511 *TransCanada Energy*, *supra* note 502 at paras 14, 19.
512 *Ibid* at paras 18–19.
513 *Ibid* at para 21.
514 *Ibid* at para 22.
515 *Ibid* at paras 23, 25.

was conducting its investigation and that there was no dispute necessitating the need to appoint an arbitrator.[516]

The two issues in the TCE and ASTC application were as follows: (1) should an order be granted appointing second arbitrators for the three proposed arbitrations; and (2) is there "a 'dispute' between the parties [that] would trigger the arbitration provisions in the PPAs."[517] The issue in the Pool's cross-application was whether a stay of the three arbitrations should be granted pending resolution of the AG Application for a declaration on the question of law.[518]

3. DECISION

Chief Justice Wittmann evaluated both the PPAs and the *Arbitration Act*[519] during the course of his analysis of the issues.[520] He held that the Notices of Termination provided by TCE and ASTC to the Pool were in accordance with the provisions of the PPAs, and given that the parties failed to come to a resolution within the time period set forth in the PPAs, the Court determined a deemed dispute existed between the parties.[521] The deemed dispute triggered the PPAs' dispute resolution procedures and the failure of the parties to resolve the dispute within the time specified in the PPAs invoked the requirement for binding arbitration.[522] Due to the Pool's failure to select an arbitrator, pursuant to the *Arbitration Act*, the Court selected the second arbitrator.[523]

The Court dismissed the Pool's cross-application to stay the arbitrations pending resolution of the AG Application on the basis that it was not unfair to require the Pool to participate in the three arbitrations, as there are sufficient built-in mechanisms within the PPAs to allow for the question of law, namely the phrase "or more unprofitable" being considered under the AG Application, to be referred to the court.[524]

4. COMMENTARY

This decision suggests that, although the Pool has a right to conduct any investigation it deems appropriate, this can result in a deemed dispute. The Pool does not have to expressly reject the position of the other parties. The tight timeline for a deemed dispute in the PPAs was strictly adhered to. The Notices of Termination were provided on 7 March 2016 and the Pool immediately advised that it would be conducting an investigation.[525] In return correspondence on the same day, TCE and ASTC advised that they considered there to be a deemed dispute.[526] On 15 March 2016, TCE indicated that, since the parties were unable

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516 *Ibid* at paras 25–26.
517 *Ibid* at para 7.
518 *Ibid* at para 8.
519 RSA 2000, c A-43.
520 *TransCanada Energy*, *supra* note 502 at para 27–31.
521 *Ibid* at para 63.
522 *Ibid* at para 64.
523 *Arbitration Act*, *supra* note 519, s 10.
524 *TransCanada Energy*, *supra* note 502 at paras 15, 67.
525 *Ibid* at paras 18–21.
526 *Ibid* at para 22.

to resolve their disputes within five business days, they were referring their dispute to members of senior management.[527]

One result of this ruling is that the three arbitrations may result in conflicting decisions if they proceed, because the AG Application has not yet been decided. While Chief Justice Wittmann, in denying the Pool's cross-application, notes that section 19.4(i) of the PPAs allows either party to "refer a question of law to a court of competent jurisdiction for final and binding determination notwithstanding that it may be part of a dispute before the board of arbitrators,"[528] this section does not grant an automatic stay of the arbitration.

XI. CASES TO WATCH

A. *LIVENT INC. (RECEIVER OF) V. DELOITTE & TOUCHE*[529]

In *Livent*, the Ontario Court of Appeal upheld an order requiring the accounting firm of Deloitte & Touche to pay $118 million in damages for negligence in its work as auditor of Livent Inc., a failed publicly traded theatre company.[530] The Supreme Court has granted leave to appeal this decision.

Livent is a highly anticipated case because it gives the Supreme Court an opportunity to revisit its decision in *Hercules Managements Ltd. v. Ernst & Young*,[531] which limited an auditor's duty of care and made it difficult for a party to hold an auditor liable when a company collapses. The decision will consider whether an auditor's duty of care includes a duty to resign, as well as the principles of corporate identification and the defence of *ex turpi causa*.

B. *KTUNAXA NATION V. BRITISH COLUMBIA (FORESTS, LANDS AND NATURAL RESOURCE OPERATIONS)*[532]

Ktunaxa involved the proposed development of a year-round ski resort on Crown land that the Ktunaxa believes is "the heart of a central area of paramount spiritual significance."[533] The Minister of Forests, Lands and Natural Resource Operations (the Minister) approved the development plan for the ski resort in 2012.[534] The Ktunaxa Nation alleged that this would be desecration of sacred lands.[535]

The British Columbia Court of Appeal found that the Minister's decision did not violate the Ktunaxa Nation's freedom of religion and the Minister had not breached a duty to accommodate and consult pursuant to section 35 of the *Constitution Act, 1982*.[536] The Court

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527 *Ibid* at para 23.
528 *Ibid* at para 67.
529 2016 ONCA 11, 128 OR (3d) 225 [*Livent*], leave to appeal to SCC granted, [2016] 1 SCR ix.
530 *Ibid* at para 5, aff'g 2014 ONSC 2176, 11 CBR (6th) 12.
531 [1997] 2 SCR 165.
532 2015 BCCA 352, 387 DLR (4th) 10 [*Ktunaxa*], leave to appeal to SCC granted, [2016] 1 SCR xii.
533 *Ktunaxa*, *ibid* at para 9.
534 *Ibid* at para 1.
535 *Ibid* at para 9.
536 *Supra* note 18.

further found that the group, in asserting its rights under section 2(a) of the *Charter*,[537] should not be capable of restraining and restricting behaviour of others who do not share the same beliefs.[538]

The Supreme Court has granted leave to appeal and the decision will necessarily examine the scope of religious freedom under section 2(a) of the *Charter* and, in particular, how it is applied in the context of First Nations spirituality. The Supreme Court will likely consider how courts and administrative decision-makers should characterize an asserted Aboriginal right to exercise spiritual practices.

C. *CHURCHILL FALLS (LABRADOR) CORPORATION LTD. C. HYDRO-QUÉBEC*[539]

The Supreme Court granted leave to appeal to Churchill Falls (Labrador) Corporation Limited (CFLCo) in a case regarding a 65-year term contract under which Hydro-Québec agreed to purchase virtually all of the electricity generated by a hydroelectric plant on the Churchill River in Labrador.[540] The contract was entered into in 1969 and has generated more than $26 billion for Hydro-Québec and about $2 billion for the province of Newfoundland and Labrador.[541]

At the Quebec Court of Appeal, CFLCo argued that the large profits from the plant were not foreseeable at the time of contract formation and that the long-term nature of the contract was unfair.[542] It contended that Hydro-Québec has an obligation to act in good faith, to cooperate, and to exercise its contractual rights reasonably, and that these obligations require that the pricing be renegotiated.[543] Considering the measured application by the courts of good faith obligations, it is interesting that the Supreme Court agreed to hear this case.

D. *GARCIA V. TAHOE RESOURCES INC.*[544]

In *Tahoe*, the British Columbia Court of Appeal overturned a stay imposed by a lower court and allowed an action relating to events in Guatemala to proceed against Tahoe Resources Inc. (Tahoe) in British Columbia. The plaintiffs were individuals who had been shot at and injured by private security personnel while protesting outside of a Guatemalan mine operated by Tahoe.[545] Tahoe filed a notice of appeal with the Supreme Court,[546] but the Supreme Court declined to hear its appeal.[547]

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537 *Supra* note 463.
538 *Ktunaxa*, *supra* note 532 at para 73.
539 2016 QCCA 1229, 2016 QCCA 1229 (CanLII) [*Churchill Falls*], leave to appeal to SCC granted, 37238 (20 April 2017).
540 *Ibid* at para 2.
541 The Canadian Press, "Supreme Court of Canada to Review 1969 Churchill Falls Energy Deal," *CBC News* (20 April 2017), online: <www.cbc.ca/news/canada/newfoundland-labrador/supreme-court-canada-review-churchill-falls-energy-deal-1.4077258>.
542 *Churchill Falls*, *supra* note 539 at para 3.
543 *Ibid* at para 4.
544 2017 BCCA 39, 407 DLR (4th) 651 [*Tahoe*].
545 *Ibid* at para 1.
546 *Ibid*, leave to appeal to SCC requested, 37492 (20 March 2017).
547 *Ibid*, leave to appeal to SCC refused, 37492 (8 June 2017).

While the lower court had granted a stay on the grounds of *forum non conveniens*, the British Columbia Court of Appeal found that there was a real risk that the plaintiffs would not obtain a fair trial in Guatemala as a result of corruption in the legal system.[548] Therefore, British Columbia was the more appropriate forum.[549] The outcome of the case may have serious implications for Canadian mining companies operating abroad, or international companies that maintain registered offices in Canada, which in this case resulted in jurisdiction *simpliciter* as Tahoe's office is in British Columbia.

[548] *Tahoe*, *ibid* at para 130.
[549] *Ibid* at para 131.

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