# RECENT JUDICIAL DECISIONS OF INTEREST TO ENERGY LAWYERS

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*This article summarizes recent judicial decisions of interest to energy lawyers. The authors review and comment on case law from the past year in several areas including Indigenous law, contractual interpretation, securities litigation, class actions, environmental law, intellectual property, insurance law, bankruptcy and insolvency, employment law, and arbitration. The authors discuss the practical implications of the decisions and risk-management strategies that may be of benefit to participants in the energy industry. The authors also highlight cases to watch in 2026.*

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## I. DUTY TO CONSULT

### A. *KEBAOWEK FIRST NATION V. CANADIAN NUCLEAR LABORATORIES*

#### 1. BACKGROUND

*Kebaowek First Nation v. Canadian Nuclear Laboratories*[1] relates to an application to the Federal Court for judicial review of a decision of the Canadian Nuclear Safety Commission (the Commission when referring to the tribunal; the CNSC when referring to the organization).

#### 2. FACTS

Kebaowek First Nation (Kebaowek) is one of 11 Algonquin Anishinabeg Nations that together form the broader Algonquin Nation. Kebaowek is a member nation of the Algonquin Anishinabeg Nation Tribal Council. The Site (as defined below) is located within Kebaowek's traditional territory, which spans Ontario and Quebec.

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1 2025 FC 319 [*Kebaowek*].

Canadian Nuclear Laboratories (Canadian Nuclear) holds the licence for the Chalk River Laboratories Site (the Site) and manages operations of a nuclear facility on the Site. Operations at the Site generated radioactive waste, and as such, Canadian Nuclear sought to develop a Near Surface Disposal Facility (the Disposal Facility) at the Site to permanently store and dispose of such hazardous waste in line with modern standards. If approved, the Court stated that the proposed Disposal Facility would "have a permanent impact on the Site,"[2] rendering it unusable for Indigenous groups for the foreseeable future.[3]

In March 2017, Canadian Nuclear applied to the CNSC to amend its licence to allow the construction of the Disposal Facility on the Site. The Commission granted the application, allowing Canadian Nuclear to amend their licence and construct the Disposal Facility.

Kebaowek applied to the Federal Court for judicial review of the Commission's decision, arguing that the Commission erred in law by declining to apply the United Nations Declaration on the Rights of Indigenous Peoples[4] and the *United Nations Declaration on the Rights of Indigenous Peoples Act*[5] in coming to its decision. Kebaowek also argued that UNDRIP required the Commission to undertake a deep level of consultation.

Canadian Nuclear argued that the Commission considered the application of UNDRIP but determined that it did not have the jurisdiction to determine how UNDRIP should be implemented in Canadian law. Canadian Nuclear argued that it had undertaken a deep level of consultation as required by current Canadian common law.

3. DECISION

The Federal Court found that the Commission erred in finding that it did not have the jurisdiction to determine if UNDRIP and the *UNDA* applied to the duty to consult and accommodate. As such, since the Commission failed to consider UNDRIP and the *UNDA*, it had failed to properly assess whether the duty to consult and accommodate was properly discharged.

Justice Blackhawk confirmed that the Commission had the authority to determine legal questions, including those surrounding section 35 of the *Constitution Act*.[6] Jurisprudence indicates that there is no basis to "distinguish questions arising under section 35 from other constitutional questions," and that, as long as the administrative tribunal is empowered to make legal decisions, the tribunal can make decisions on section 35 rights.[7] The Federal Court confirmed that "the Commission has the authority, pursuant to its governing legislation, to determine questions of law" — and therefore, can make decisions concerning the interpretation of the fulfillment of the duty to consult and accommodate as per *Haida Nation v. British Columbia (Minister of Forests)* (*Haida*).[8] The Federal Court noted that the Commission and other tribunals are permitted, per section 18.3(1) of the *Federal Courts Act*,

2 *Ibid* at para 28.
3 *Ibid* at para 174.
4 UNGA, 61st Sess, UN Doc A/Res/61/295 (2007) GA Res 61/295 [UNDRIP].
5 SC 2021, c 14 [*UNDA*].
6 *1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
7 *Kebaowek*, *supra* note 1 at para 66.
8 2004 SCC 73; *Kebaowek*, *supra* note 1 at paras 68–70.

to refer questions to the Federal Court for determination.[9] Justice Blackhawk stated that "[t]he Commission's failure to interpret its governing statutory authority [or] to seek guidance from the Federal Court [was] an error of law."[10]

The Federal Court also confirmed that the Commission had the jurisdiction to determine if UNDRIP and the *UNDA* altered the duty to consult and accommodate.[11] Justice Blackhawk noted that, while "UNDRIP does not create new law… [I]t is an interpretive lens to be applied to determine if the Crown has fulfilled its obligations"; UNDRIP was incorporated into Canada's legal framework in 2021 when the *UNDA* became law.[12] Justice Blackhawk also noted that other tribunals have considered the application of UNDRIP following the enactment of the *UNDA*. This, along with the presumption of conformity, indicates that the "interpretation of section 35 … will be done in a manner that conforms to international agreements that Canada is a part of, including the UNDRIP."[13] The Federal Court found that the Commission's decision that it did not have the jurisdiction to determine and apply UNDRIP, was an error of law.[14]

Justice Blackhawk reaffirmed the discussion above, stating that the interpretation of "section 35 rights in a manner consistent with the UNDRIP aligns with the objectives … of the *UNDA*."[15] By applying rules of statutory interpretation, along with considering how UNDRIP has been addressed by international courts, the Federal Court indicated that UNDRIP is now, through the *UNDA*, a part of Canadian law "such that it may be used to interpret the scope of the duty to consult and accommodate."[16]

The Federal Court found that the proposed Disposal Facility fell within the scope of article 29(2) of UNDRIP, which states that "no storage or disposal of hazardous materials shall take place in the lands or territories of [I]ndigenous peoples without their free, prior and informed consent."[17] Justice Blackhawk noted that, when this article is triggered, the UNDRIP standard of free, prior, and informed consent (FPIC) applies. The Federal Court clarified that this standard, while not a veto, is a right to a "robust" process that places a "heightened emphasis on the need for a deep level of consultation."[18] When the FPIC standard is triggered, "establishing consent … with [I]ndigenous peoples" should be viewed as the objective of consultation.[19] The Federal Court noted that the inclusion of UNDRIP into Canadian law via the *UNDA* means that there must be "more than a status quo application" of the section 35 framework and the duty to consult and accommodate.[20] The Federal Court concluded that the Commission made an error of law by failing to address how the UNDRIP standard of FPIC requires a "more robust process."[21]

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9 RSC 1985, c F-7, s 18.3(1); *Kebaowek*, *supra* note 1 at para 71.
10 *Kebaowek*, *supra* note 1 at para 73.
11 *Ibid* at para 63.
12 *Ibid* at paras 76, 80.
13 *Ibid* at para 85.
14 *Ibid* at para 86.
15 *Ibid* at para 81.
16 *Ibid* at paras 102–11.
17 *Ibid* at para 130.
18 *Ibid* at paras 130–31.
19 *Ibid* at para 96, quoting James Anaya, *Indigenous Peoples in International Law* (Oxford: Oxford University Press, 1996) at 81.
20 *Kebaowek*, *supra* note 1 at para 128.
21 *Ibid* at para 133.

Justice Blackhawk also noted that the consultation process provided in this case was inadequate, and therefore, the duty to consult and accommodate was not discharged. The duty to consult and accommodate "lies along a spectrum based on the strength of the section 35 right asserted … and the nature of the proposed infringement of that right."[22] The required level of consultation will vary with each individual case. In a situation where the Aboriginal claim to rights or title is weak, or the infringement of section 35 rights is minor, the Crown's requirements to discharge its duty to consult may be minimal (providing simple notice, for example). On the other hand, where there is a strong case for Aboriginal rights or title, and the potential infringement of section 35 rights is significant, the Crown may be required to do more in order to discharge its duties. This may require deep consultation and accommodation, such as formal Indigenous participation in the decision-making process, or in some cases, "full consent of an [A]boriginal nation."[23] However, the Federal Court notes that even at the high end of the spectrum, the Aboriginal party does not have a veto.[24]

In this case, the Federal Court found that when taking the perspective of Indigenous rights holders, the duty to consult and accommodate, along with the triggered FPIC standard, required the CNSC to ensure a more robust consultation process. CNSC's failure to accommodate Kebaowek's requests to improve consultation (such as hosting consultation in the Indigenous community and allowing longer submissions) led the Federal Court to find that the duty to consult and accommodate was not adequately discharged in this case.

## 4. COMMENTARY

This decision is one of the first to grapple with how UNDRIP and the *UNDA* should be factored into the duty to consult process. The Court suggests that UNDRIP and the *UNDA* impose a heightened standard for deeper consultation and, as such, the standard from *Haida* may no longer be sufficient.

However, the decision does not fully answer the question of what that higher standard should be or how it might be applied. It seems to suggest that UNDRIP and the *UNDA* would require a more robust consultation process aimed at mutual agreement, taking into consideration Indigenous perspectives, knowledge, and culture. However, this seems to flirt with the idea that Indigenous groups may have a substantive veto over projects, something that the Supreme Court of Canada has rejected. It is unclear whether UNDRIP and the *UNDA* could shift obligations on the Crown in such a substantive manner.

The ultimate effect of this case is likely to create additional uncertainty around how to satisfy the duty to consult and accommodate. Here, Canadian Nuclear appears to have done all that was required under the *Haida* framework yet failed to satisfy the more nebulous requirements of UNDRIP and the *UNDA*. Without further guidance on the actual requirements imposed by these instruments, organizations will be left in a difficult spot trying to navigate this new jurisprudential terrain.

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22 *Ibid* at para 112.
23 *Ibid* at para 116.
24 *Ibid* at para 122.

## B. *THOMAS V. RIO TINTO ALCAN INC.*

### 1. BACKGROUND

*Thomas v. Rio Tinto Alcan Inc.*[25] concerned an appeal that engaged the question of when a court may find private liability in tort for the breach of Aboriginal rights. It involved an action by the Saik'uz and Stellat'en First Nations (the First Nations) who asserted Aboriginal title and rights, in particular fishing rights, over the Nechako River watershed.

### 2. FACTS

In the 1950s, British Columbia had authorized the predecessor of Rio Tinto to build the Kenney Dam on the Nechako River, which dramatically changed the Nechako watershed. The First Nations brought a claim against Rio Tinto in nuisance, arguing that Rio Tinto's actions had disturbed their enjoyment of their lands and rights. The First Nations sought interim and permanent injunctions restraining Rio Tinto from continuing the acts of nuisance and a mandatory injunction requiring Rio Tinto to return the watershed to its former state by releasing additional amounts of water.[26]

Rio Tinto defended the claim on a number of grounds, including that its actions were done with statutory authority. This defence provides that a party's actions are immune from a nuisance claim if they are the inevitable result of government-authorized conduct.

The trial judge found that Rio Tinto's actions amounted to nuisance, but the First Nations appealed the trial judge's conclusion that the defence of statutory authority was available and a full defence to the claims.[27]

### 3. DECISION

The British Columbia Court of Appeal upheld the trial judge's decision but amended the declaratory relief. The trial judge granted the narrow declaratory relief stating that British Columbia and Canada had an "obligation" to protect the First Nations' right to fish for food, social, and ceremonial purposes in the Nechako River watershed.[28]

The Court of Appeal found that this declaration had "no real practical utility" and was not justified on the submissions before it.[29] The Court of Appeal significantly expanded the relief by declaring that British Columbia and Canada have fiduciary duties to protect the First Nations' established Aboriginal right to fish by consulting with the First Nations when managing annual allocation and flow regimes for the Nechako River.[30]

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25 2024 BCCA 62, leave to appeal to SCC refused, 2024 CanLII 96608 (SCC).
26 *Ibid* at paras 1–17.
27 *Ibid* at para 37.
28 *Ibid* at para 14.
29 *Ibid* at para 392.
30 *Ibid* at paras 449–61.

### 4. COMMENTARY

This case is important for several reasons. First, the Court of Appeal reaffirmed the ability of Indigenous groups to bring actions for private liability in tort for the breach of Aboriginal rights. Moreover, it found that it was not necessary to establish Aboriginal title to ground rights like protection from nuisances, but that asserted rights would suffice. In this case the fishing rights were sufficient to ground the claim in nuisance. The Court also accepted that such claims could also be grounded in interests in reserve lands and Aboriginal title.[31]

The First Nations had also asserted Aboriginal title to the riverbed in locations along the Nechako River. The Court declined to address this issue.[32] Thus, the question of whether title can be claimed on a submerged area remains unanswered.

The Court upheld the trial judge's decision to accept the defence of statutory authority in this situation for Rio Tinto.[33] This was despite the First Nation's argument that the authorizations for the Kenney Dam were constitutionally inapplicable insofar as they infringed the First Nations' Aboriginal rights.[34] The Court rejected this argument and found that Rio Tinto had acted properly, and any remedy lay against the Crown and not the private party that had relied on Crown authority.[35]

The Court of Appeal picked up on this finding regarding Crown obligations in expanding the declaratory relief to ensure it was meaningful.[36] It reinforced the need for the Crown to meaningfully consult with the First Nation around issues related to waterflow in the Nechako River watershed.[37] The Court was cognizant that the declaration should not become a mechanism to grant indirect relief against Rio Tinto and as such, it limited the specifics of the ultimate declaration.[38]

## II. CLIMATE CHANGE AND ENVIRONMENTAL LAW

### A. *MATHUR V. ONTARIO*

### 1. BACKGROUND

*Mathur v. Ontario*[39] is likely the most important climate litigation decision in recent years and is a precedent setting case for climate litigation in Canada and, potentially, internationally. The Court of Appeal overturned the lower court's decision and unanimously held that the *Mathur* claim was not a "positive rights" claim, and that the judiciary is entitled to exercise its discretion to grant declaratory relief without undermining the separation of powers.[40]

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31 *Ibid* at paras 309–21.
32 *Ibid* at para 323.
33 *Ibid* at paras 155–239.
34 *Ibid* at para 15.
35 *Ibid* at paras 265–84.
36 *Ibid* at paras 391–462.
37 *Ibid* at para 457.
38 *Ibid* at para 433.
39 2024 ONCA 762 [*Mathur*], leave to appeal to SCC refused, 2025 CanLII 38373 (SCC).
40 *Ibid* at para 5.

### 2. FACTS

The appellants, seven Ontario youth, argued that Ontario's failure "to comply with its voluntarily imposed statutory obligations to combat climate change"[41] amounted to a breach of their sections 7 and 15 rights under the *Canadian Charter of Rights and Freedoms*.[42] In 2018, Ontario enacted the *Cap and Trade Cancellation Act*, *2018* (*CTCA*)[43] which repealed the *Climate Change Mitigation and Low-carbon Economy Act*.[44] The *Climate Change Act* established a greenhouse emission reduction target of 37 percent below 2005 levels by 2030 in the province, whereas the *CTCA* set a new target of "a 30 percent reduction of greenhouse gas emissions from 2005 levels by 2030."[45] Moreover, the new target did not comply with the international scientific consensus regarding reductions for mitigating the "most catastrophic effects of climate change."[46]

The appellants argued that the revised target did not adequately address the risks associated with climate change, which they claimed violated the rights of Ontario youth and future generations under sections 7 and 15 of the *Charter*. Consequently, the appellants sought an order (1) declaring that the *CTCA* violated their *Charter* rights, (2) requiring Ontario to set a science-based emissions reduction target, and (3) requiring Ontario to revise its climate change plan in accordance with international standards.[47]

The Ontario Superior Court application judge dismissed the youth's claim in the lower court on the basis that although the claim was justiciable, the *CTCA* did not violate their *Charter* rights. The application judge found that the Province's revised target for reducing greenhouse gas emissions was not arbitrary and the *Charter* did not impose a positive obligation on the Province to take any specific actions to combat climate change.[48] The youths appealed the application judge's decision.

### 3. DECISION

The Ontario Court of Appeal unanimously granted the appeal and rejected the application judge's characterization of the appellants' claim as seeking to impose positive obligations on Ontario to combat climate change.[49] The Court of Appeal held that the application judge erred in finding that the *Mathur* claim was a positive rights claim. Rather, insofar as Ontario enacted the *CTCA*, the Court determined that it had "voluntarily assumed a positive statutory obligation to combat climate change."[50] As a result, Ontario needed to provide a statutory mechanism to ensure the Province's underlying plans and targets complied with the *Charter*.

Further, the Court of Appeal rejected Ontario's argument that *Charter*-based climate litigation invites the judiciary to commandeer energy and climate policy improperly from the

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41 *Ibid* at para 1.
42 Part 1 of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
43 *Mathur*, *supra* note 39 at para 2; SO 2018, c 13 [*CTCA*].
44 *Mathur*, *supra* note 39 at para 2; SO 2016, c 7 [*Climate Change Act*].
45 *Mathur*, *supra* note 39 at para 2.
46 *Ibid*.
47 *Ibid* at para 3.
48 *Ibid* at para 4.
49 *Ibid*.
50 *Ibid* at para 5.

government.[51] The Court noted that it was possible to order a declaration that Ontario had violated the appellants' sections 7 and 15 *Charter* rights without telling Ontario precisely what to do to make its target *Charter* compliant.[52] Further, the Court of Appeal reconfirmed the Supreme Court of Canada's finding that a court may "exercise its discretion to grant declaratory relief as a proper remedy [while being] respectful of the responsibilities of the executive and the courts."[53]

Given the paucity of the evidentiary record, the Court of Appeal declined to determine the appellants' case on its merits and remitted the application for further consideration by the lower court.[54]

In December 2024, Ontario sought leave to appeal the Ontario Court of Appeal's decision, claiming that *Mathur* raised questions of national importance. The Supreme Court of Canada dismissed the application in May 2025, and the case will now proceed to another hearing in the Superior Court.

### 4. COMMENTARY

The *Mathur* decision and the Supreme Court of Canada's dismissal of Ontario's leave to appeal is a noteworthy development for climate litigation in Canada and revives the possibility that a court may find Ontario's emissions target to be unconstitutional.

The Supreme Court of Canada's denial of Ontario's leave to appeal makes *Mathur* the first Canadian climate change claim under the *Charter* to advance to a hearing on the merits. Should the Superior Court conclude that Ontario's climate policies did not adequately address the risks of climate change and breached the *Charter*, it would be a precedent-setting case as it would be the first time a Canadian court determined that a government's failure to act, or to act adequately, with respect to climate change was unconstitutional.

*Mathur* indicates that we can likely expect more constitutional challenges to government climate policy in the future in Canada and beyond.

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

### 1. BACKGROUND

In *Paramount Resources Ltd v. Grey Owl Engineering Ltd.*,[55] the Alberta Court of Appeal clarified how limitation periods operate with respect to environmental claims and confirmed (1) the requirements for a claim for contribution under the *Limitations Act*,[56] and (2) the nature of a judge's decision to extend a limitation period under the *Environmental Protection and Enhancement Act*.[57] *Paramount* also reaffirms the often competing objectives of the

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51 *Ibid* at para 67.
52 *Ibid* at para 69.
53 *Ibid*.
54 *Ibid* at para 76.
55 2024 ABCA 60 [*Paramount*].
56 RSA 2000, c L-12 [*Limitations Act*].
57 RSA 2000, c E-12 [*EPEA*].

*Limitations Act* and the *EPEA* with respect to limitation periods, and the requirement to balance these objectives.

### 2. Facts

Paramount Resources Ltd. (Paramount) owned and operated a pipeline that was constructed in 2001. In 2004, Paramount decided to convert the pipeline into a carrier pipeline using a fibreglass liner inside of its steel carrier pipe.[58] Paramount hired Grey Owl Engineering Ltd. (Grey Owl) to supply and install the fibreglass liner.

Following the completion of Grey Owl's work in 2004, Paramount discontinued the pipeline's operation. In 2017, Paramount sought to reactivate the pipeline and recommenced operations sometime around 20 March 2018.[59]

On 11 April 2018, Paramount discovered a leak in the pipeline that it was required to remediate under the *EPEA*.[60] Paramount paid to remediate the leak but commenced an action against Grey Owl for recovery, alleging that its "failure in 2004 to ensure that the steel carrier pipe and fibreglass liner were installed below the frost line" caused the leak.[61]

Grey Owl and Paramount made cross-applications.[62] Grey Owl sought to summarily dismiss Paramount's claim as being statute barred by the ten-year ultimate limitation period under section 3(1)(b) of the *Limitations Act*,[63] and Paramount sought to extend the limitation period pursuant to section 218 of the *EPEA*.

In 2022, the Alberta Court of King's Bench dismissed Paramount's claim and its request for a section 218 extension.[64] Paramount appealed.

### 3. Decision

The Court of Appeal held that (1) the *Limitations Act* barred Paramount's claim; and (2) the *EPEA* did not extend the limitation period.

Grey Owl argued that the claim was limitation barred because it provided its services more than 10 years before the claim arose. However, Paramount argued section 3(1)(b) did not apply because its claim against Grey Owl was a claim for contribution under section 3(3)(e) of the *Limitations Act*, which did not arise until 2018. Section 3(3)(e) provides:

> [A] claim for contribution arises when the claimant for contribution is made a defendant in respect of, or incurs a liability through the settlement of, a claim seeking to impose a liability on which the claim for contribution can be based, whichever first occurs.[65]

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58 *Paramount*, *supra* note 55 at para 6.
59 *Ibid* at paras 9–10.
60 *Ibid* at para 11.
61 *Ibid* at para 14.
62 *Ibid* at para 15.
63 *Limitations Act*, *supra* note 56, s 3(1)(b).
64 *Paramount Resources Ltd v Grey Owl Engineering Ltd*, 2022 ABQB 333 at para 5.
65 *Limitations Act*, *supra* note 56, s 3(3)(e).

The Alberta Court of Appeal concluded that Paramount's claim was not a claim for contribution and, therefore, section 3(3)(e) of the *Limitations Act* was inapplicable.[66] The Court confirmed that a claim for contribution requires that both the claimant and the claimee share potential liability to a third party[67] and "that a claim for contribution exists 'only if the third party is directly liable to the plaintiff.'"[68] Thus, for Paramount to seek contribution from Grey Owl, the parties would both need to "be potentially liable for the environmental damage to the party to whom Paramount [was] liable."[69] In this case, there was no shared liability between Paramount and Grey Owl with respect to a third party.[70]

Paramount also sought to extend the applicable limitation period pursuant to section 218 of the *EPEA*. Section 218 provides a judge with discretion to extend a limitation period "where the basis for the proceeding is an alleged adverse effect resulting from the alleged release of a substance into the environment."[71]

The Court of Appeal highlighted the discretionary nature of a judge's decision to extend a limitation period and upheld the chambers judge's decision that Paramount's circumstances did not warrant an extension under section 218 of the *EPEA*.[72] In making this determination, the Court highlighted that previous precedent established that in applying section 218 of the *EPEA*, a judge should consider the purposes of both the *Limitations Act* and the *EPEA*, which have competing objectives: the *Limitations Act* seeks finality and the *EPEA* holds polluters accountable and ensures that issues related to discoverability do not hinder environmental claims.[73] The Court of Appeal held that the chambers judge balanced the competing objectives of the *Limitations Act* and the *EPEA* in finding that no extension was warranted.

The Court also noted that various factors guide a judge's discretion under the *EPEA*, including (1) when the alleged adverse effect occurred, (2) whether it ought to have been discovered through the exercise of due diligence, and (3) the potential prejudice to the defendant.[74] Further, the Court of Appeal confirmed that "[s]ection 218 does not create categories of permitted and unpermitted claims for which an extension can (or cannot) be granted."[75] Rather, a judge's discretion is guided by the factors listed under section 218 and "any other criteria the court considers relevant."[76] The Court of Appeal held that in exercising discretion, the chambers judge acted reasonably in considering factors such as whether remediation had occurred, a complainant's responsibility, and the relationship between the claimant and the party against whom the claim is brought.[77]

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66 *Paramount*, *supra* note 55 at para 40.
67 *Ibid* at para 31.
68 *Ibid* at para 29.
69 *Ibid* at para 34.
70 *Ibid* at paras 37–39.
71 *EPEA*, *supra* note 57, s 218(1).
72 *Paramount*, *supra* note 55 at para 57.
73 *Ibid* at para 47.
74 *EPEA*, *supra* note 57, s 218(3).
75 *Paramount*, *supra* note 55 at para 55.
76 *Ibid* at para 55.
77 *Ibid* at paras 58–61.

### 4. COMMENTARY

This decision provides insight into the factors that a court should consider when determining whether to extend a limitations period under section 218 of the *EPEA*. Importantly, *Paramount* confirms that an extension will only be granted in exceptional circumstances, and a court shall be given wide discretion to consider any factors that it may deem relevant. The Court clarified that section 218 does not create categories of "permitted" versus "unpermitted" claims for which an extension may be granted or refused.[78] Instead, the Court is required to consider the various factors set out in section 218 and any other criteria the Court considers relevant to the case. As such, we can anticipate further litigation of this provision in the future.

However, the decision in Paramount provides some clarity with respect to the definition of the term "persons responsible" under the *EPEA*. It confirms that the defining factor is the *control* over substances that were released at the time of the release, not the historical involvement in the construction or approval of the container transporting or storing the substances.

## C. *OBSIDIAN ENERGY LTD. V. CORDY ENVIRONMENTAL INC.*

### 1. BACKGROUND

In *Obsidian Energy Ltd. v. Cordy Environmental Inc.*,[79] the British Columbia Court of Appeal highlighted the circumscribed scope of claimants under the *Environmental Management Act*.[80] Although, on its face, section 47(5) of the *EMA* seemingly permitted a broad swath of people to claim for remediation-related work, the Court held that the principles of statutory interpretation supported a more restricted reading of the provisions.

The Court's decision suggests that, notwithstanding expansive language in statutes akin to the *EMA*, courts may interpret the statutory schemes and objectives to narrow the scope of potential claimants.

### 2. FACTS

Obsidian Energy Ltd. (Obsidian) owned a pipeline in northern BC which had a spill in 2015. The spill was reported, and the British Columbia Oil and Gas Commission issued a general order in July 2017 requiring remediation of the pipeline and contaminated area by the operator and permit holder.

In June 2017, Obsidian sold the pipeline to Predator Oil B.C. Ltd. (Predator).[81] Subsequently, in September 2017, Predator assigned its rights in the pipeline and the impacted site to OpsMobil Energy Services Inc./Ranch Energy Corporation (OpsMobil).[82]

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78 *Ibid* at para 55.
79 2024 BCCA 226 [*Obsidian*].
80 SBC 2003, c 53 [*EMA*].
81 *Obsidian*, *supra* note 79 at para 4.
82 *Ibid* at para 6.

Once OpsMobil obtained the rights to the spill area, it hired Cordy Environmental Inc. (Cordy) to supervise and transport materials from the spill site.[83]

Between March and April 2018, Cordy performed these services but OpsMobil failed to pay its invoices.[84] Subsequently, OpsMobil was placed into receivership and Cordy requested to be listed as OpsMobil's unsecured creditor.[85] Following the sale of the pipeline, the impacted site, and OpsMobil's other assets, Cordy filed a Notice of Civil Claim against numerous defendants, including Obsidian and OpsMobil, and brought an application for summary judgment under section 47 of the *EMA* seeking to recover its service costs on the basis that Obsidian was the owner of the site at the time of the spill and thus had a statutory duty to remediate the contamination. In response, Obsidian sought dismissal of the claim on the grounds that the debt claim did not fall within the *EMA's* scope.

The lower court found that Cordy could claim costs under section 47(1) of the *EMA* for the work it performed on behalf of a responsible party. Obsidian appealed.

3. DECISION

The British Columbia Court of Appeal held that Cordy's claim did not fall within the scope of the *EMA*. The Court focused on the issue of "whether an unpaid and unsecured independent contractor who provides remediation-related work at a contaminated site has a cause of action against former owners or operators of the site under s. 47(5) of the *EMA*."[86] In addressing this issue, the Court engaged in statutory interpretation.

The Court primarily grounded its analysis in section 47(5) of the *EMA*, which states that:

> Subject to section 50(3) [*minor contributors*], any person, including, but not limited to, a responsible person and a director, who incurs costs in carrying out remediation of a contaminated site may commence an action or a proceeding to recover the reasonably incurred costs of remediation from one or more responsible persons in accordance with the principles of liability set out in this Part.[87]

The Court of Appeal considered whether Cordy fell within the scope of "any person" under section 47(5) of the *EMA* and, ultimately, held that section 47(5) did not apply to Cordy. The Court's analysis referred to numerous other sections in the *EMA*, as well as the *EMA*'s overarching objectives. These considerations supported the conclusion that "any person" was tied to persons who undertook remediation "as someone with ownership, possession, control, directive authority, or a proprietary interest in the affected site."[88] For instance, the *EMA*'s provisions related to liability and the recovery of costs focused on "polluters" and "current

83 *Ibid* at para 7.
84 *Ibid* at para 8.
85 *Ibid* at para 9.
86 *Ibid* at para 29.
87 *Ibid* at para 58 [emphasis removed].
88 *Ibid* at para 67.

owners."[89] Similarly, the *EMA*'s definition of "remediation" was tailored to owners and persons with control over an area.[90] Consequently, the Court concluded that:

> [A] "… person … who incurs costs in carrying out remediation of a contaminated site…" within the meaning of s. 47(5) does not include an unpaid and unsecured independent contractor whose only connection to a contaminated site is that they were retained by the current owner or operator to perform remediation-related work.[91]

The Court of Appeal held that section 47(5) of the *EMA* did not extend to Cordy. Cordy's claim merely derived from its contract with OpsMobil and did not stem from any responsibility to undertake remediation as an owner or someone with a stronger interest in the impacted area.[92]

#### 4. COMMENTARY

The Court of Appeal's decision serves to clarify confusion concerning: (1) the purpose of the *EMA,* and (2) the entitlement to cost recovery under section 47(5) of the legislation. This clarification is important because when the lower court decision was released, various commentators noted that the decision could create a new avenue for creditors to recover environmental remediation costs when faced with a debtor's insolvency. This was particularly so because section 47 of the *EMA* is so broadly worded.

This decision, however, appears to block this avenue. The Court of Appeal confirmed that the focus of the "polluter pays" principle under section 47 of the *EMA* is to encourage the timely cleanup of contaminated sites and provide current owners (or those with a proprietary interest in the affected site) the ability to recover remediation costs for past contamination. Therefore, an unpaid and unsecured contractor, whose only connection to the remediation work is contractual, is not entitled to bring a claim under section 47(5) of the *EMA*.

## III. GOVERNMENT INTERACTIONS

### A. *ARCELORMITTAL CANADA INC. C. R.*

#### 1. BACKGROUND

*ArcelorMittal Canada Inc. c. R.*[93] touches on the scope of the government's right to request documents. In *ArcelorMittal*, an Environment Canada (EC) investigator inappropriately obtained documents from an employee who was unauthorized to disclose such documents. The issue was whether this violated the reasonable expectation of privacy of the company, ArcelorMittal (AM), under section 8 of the *Charter*.

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89 *Ibid* at paras 41–42.
90 *Ibid* at paras 44–45.
91 *Ibid* at para 39 [emphasis removed].
92 *Ibid* at para 67.
93 2023 QCCA 1564 [*ArcelorMittal* QCCA], leave to appeal to SCC refused, 2024 CanLII 88319 (CSC).

### 2. FACTS

EC was investigating the water quality near a mine operated by AM. Throughout the investigation, EC had several meetings with AM employees. These meetings were always held in the presence of AM's legal counsel, except for one meeting. At that meeting, the EC investigator asked for documents from the employee's computer (the Employee Documents). The employee provided these and signed a consent to a warrantless search.[94] The employee did not have the authority to act on behalf of the company.

Months after this meeting, EC sent a request to AM asking for voluntary disclosure of information and documents. The request noted that AM had no legal obligation to provide the requested documents and encouraged AM to seek legal counsel in responding to the request. The letter warned that any documents submitted could be used as evidence against AM, including in prosecution under the *Fisheries Act*.[95] AM's legal counsel voluntarily provided documents (the Voluntary Documents). The Voluntary Documents included a presentation that was also included in the Employee Documents (the Presentation).[96] Ultimately, AM was charged with several offences under the *Fisheries Act*.

AM subsequently brought a motion to exclude both the Employee Documents and the Voluntary Documents, arguing that its section 8 *Charter* right against unreasonable search or seizure had been breached.[97] AM argued that its consent related to the Voluntary Documents had been vitiated because, when it provided the Voluntary Documents, it was unaware that EC had inappropriately obtained the Employee Documents.[98]

### 3. DECISION

AM was partially successful on its motion to exclude at first instance.[99] It was successful with respect to the Employee Documents, as EC did not receive the required consent to obtain the Employee Documents given that the employee was unauthorized to act on behalf of the company.[100] AM was unsuccessful, however, with respect to the Voluntary Documents because the Court found that AM had all the information it needed to make a meaningful choice as to whether to produce the records. AM appealed the decision regarding the Voluntary Documents.

The Quebec Court of Appeal upheld the lower court's decision, largely reiterating the lower court's reasons. With respect to the Presentation, the Quebec Court of Appeal noted in a footnote that it was the only document that overlapped between the Employee and Voluntary Documents and thus, did not appear to have any impact on the holding of the Voluntary

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94 *R c ArcelorMittal Canada Inc*, 2020 QCCQ 698 [*ArcelorMittal* QCCQ], aff'd 2023 QCCA 1564.
95 *Ibid* at para 58; *Fisheries Act*, RSC 1985, c F-14 [*Fisheries Act*].
96 *ArcelorMittal* QCCA, *supra* note 93 at para 88, n 91.
97 *ArcelorMittal* QCCQ, *supra* note 94 at para 7.
98 *Ibid* at para 6.
99 *ArcelorMittal* QCCA, *supra* note 93 at para 85.
100 *Ibid* at para 88.

Documents.[101] In other words, the Court found it irrelevant that the Presentation was also obtained through an unreasonable search and seizure.

#### 4. COMMENTARY

*ArcelorMittal* is a cautionary tale to energy practitioners to always ensure that: (1) legal counsel, or someone with the ability to bind the company, is present in meetings during an investigation with the government; and (2) employees receive investigation training.

In this case, the consequences of the employee handing over the Employee Documents could have had a dramatic impact on EC's investigation. While there was no direct evidence of this, it is possible that EC was able to make the request to AM for documents with the knowledge of the Employee Documents. EC may have been able to make a more targeted, and hence more responsive, document request because it had reviewed the Employee Documents.

### B. *TRILLIUM POWER WIND CORPORATION V. ONTARIO*

#### 1. BACKGROUND

*Trillium Power Wind Corporation v. Ontario*[102] concerned a former Ontario policy intended to subsidize wind power projects. The Ontario government abruptly cancelled this policy in February 2011. Trillium Power Corporation (Trillium) had been in the process of developing a wind farm under Ontario's policy. Following the cancellation of this policy, Trillium sued the Ontario government alleging multiple causes of action.

#### 2. FACTS

Motivated by Ontario's policy, Trillium had taken significant steps towards obtaining authorization to operate a wind farm. As part of its project, Trillium was to receive financing from a financial institution. On the same day the financing transaction was set to close, Ontario announced a "moratorium" on the policy.[103] As a result, Trillium did not receive its financing, and its project did not proceed. Trillium subsequently commenced an action against Ontario, seeking damages for its failed wind farm project.[104]

By 2015, the Courts had dismissed much of Trillium's claim with the only remaining causes of action being its allegations of public office misfeasance and spoliation.[105] The parties brought competing summary judgment motions. The motions judge dismissed both of Trillium's claims. Trillium appealed.

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101 *Ibid* at para 91, n 97.
102 2023 ONCA 412 [*Trillium* 2023], leave to appeal to SCC refused, 2024 CanLII 17608 (SCC).
103 *Ibid* at para 2.
104 *Ibid* at para 4.
105 *Ibid* at paras 4, 6.

### 3. DECISION

The Ontario Court of Appeal cited its earlier decision, noting that Trillium could not contest Ontario's decisions related to wind farm policies, including its decision to cancel the program:

> [A] decision by the Ontario Government to continue, suspend or discontinue its province-wide offshore wind power policy initiative is a decision "as to a course or principle of action that [is] based on public policy considerations": *Imperial Tobacco*, at para. 90. Those considerations happen to involve "political factors." Ontario's decision therefore falls within the type of "core policy decisions" that are immune from attack unless they are irrational or taken in bad faith. Here -- except to the extent they specifically targeted Trillium in order to injure it financially -- Ontario's decision was neither irrational nor made in bad faith.[106]

The Court held that Trillium had no basis to contest Ontario's decision to cancel its wind power programs, and no basis to insist that Ontario reverse the cancellation of the program and continue to offer project funding.[107] With respect to the claim for public office misfeasance, both the Ontario Court of Appeal and the motions judge found that there was no evidence that Ontario intentionally cancelled the program because of Trillium's wind farm project, or that the timing of Ontario's moratorium and Trillium's financial closing date was anything more than a coincidence.[108] Therefore, Trillium's claim for public office misfeasance was struck.

*Trillium* also considered an ancillary issue of spoliation, which occurs when "a party has intentionally destroyed evidence relevant to ongoing or contemplated litigation."[109] Notably, the Courts found that Ontario was guilty of spoliation. The Courts found that Ontario had an improper document retention policy, and that there was deliberate document destruction after the commencement of Trillium's claim.[110] However, given that the destroyed documents would have been inextricably tied to the failed misfeasance claim, the only appropriate remedy in association with the spoliation claim was to award costs against Ontario.[111]

### 4. COMMENTARY

*Trillium* is a reminder to energy companies to not put all of their eggs in one basket. When considering a large-scale project that may have a government funding component, a party should have a contingency plan in place in the event that the government withdraws that funding — recourse against the government is likely not an appropriate contingency plan.

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106 *Trillium Power Wind Corporation v Ontario (Natural Resources)*, 2013 ONCA 683 at para 50 [*Trillium* 2013].
107 *Trillium* 2023, *supra* note 102 at para 16, citing *Trillium* 2013, *supra* note 106 at paras 45–55.
108 *Trillium* 2013, *supra* note 106 at para 12.
109 *Ibid* at para 20.
110 *Ibid* at paras 27–28.
111 *Ibid* at para 36.

## IV. ROYALTIES

### A. RECAP OF NOTABLE CASES

Last year's article on this topic[112] highlighted both *Taylor Processing Inc. v. Alberta (Minister of Energy)*[113] and *Shell Canada Limited v. Alberta (Energy)*,[114] as notable decisions "confirm[ing] that … administrative decision makers must exercise their decision-making powers in a reasonable, transparent and intelligible manner, failing which they risk having their decisions overturned on judicial review."[115]

As a brief recap, in *Shell*, an audit by the Alberta Department of Energy (Alberta Energy) disallowed certain costs that Shell sought to deduct from its oil sands royalties payable to the Crown. Shell disputed the determinations as per the regulations to the Director of Dispute Resolution (the Director), who proposed to the Minister of Energy (the Minister) that the audit be confirmed as correct. Shell requested the establishment of a Dispute Resolution Committee, which the Minister denied. Justice Hall concluded that the Minister's decision was unreasonable and directed the Minister to constitute the Committee. His reasoning was relatively pointed: "The Minister has simply parroted the position of the Department of Energy. She has given no other cogent reasons for her decision. She has failed to demonstrate any consideration of the scheme and purpose of the regulations, or of the arguments made to her by Shell."[116] The Alberta Court of Appeal dismissed the appeal on the same basis.[117]

In *Taylor Processing*, Taylor, a subsidiary of AltaGas Ltd, and Nova Chemicals Corporation brought judicial reviews of the Director's decision upholding Alberta Energy's recalculation of the gas volumes on which royalties were payable. Justice Malik granted the applications and directed the Minister to repay over $20 million in overpaid royalties. While it did not directly affect his decision, he noted he "became concerned about the possibility of animus between the Department," which appeared to include not only Alberta Energy but also the Director, and the applicants, and that "the Department's conduct in this matter casts some doubt upon its motives and objectivity," such that the "Department's approach seems purely outcome-based rather than evidence-informed."[118]

### B. *SYNCRUDE CANADA LTD. V. ALBERTA (ENERGY)*

#### 1. BACKGROUND

2024 saw a continuation of the recent, yet growing, trend of judicial reviews challenging Crown audit determinations of royalties owed to the Crown for oil and gas development from Crown minerals.

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112 Karen Fellowes et al, "Recent Judicial Decisions of Interest to Energy Lawyers" (2024) 62:2 Alta L Rev 510.
113 2023 ABKB 64 [*Taylor Processing*].
114 2023 ABCA 230 [*Shell*].
115 Fellowes et al, *supra* note 112 at 558.
116 *Shell Canada Limited v Alberta (Energy)*, 2022 ABQB 4 at para 43 [*Shell* ABQB], aff'd 2023 ABCA 230.
117 *Shell*, *supra* note 114 at para 24.
118 *Taylor Processing*, *supra* note 113 at para 111.

## 2. FACTS

*Syncrude Canada Ltd. v. Alberta (Energy)*[119] involves similar facts to those in *Shell*. Syncrude objected to an Alberta Energy audit decision that disallowed the company from deducting certain costs from its revenues generated from an oil sands project. Specifically, Syncrude objected to the auditors' rejection of approximately $246.6 million in claimed costs over the years 2002–2011.[120] Allowing these costs would have decreased Syncrude's payable royalties by approximately $52 million.[121]

The Director denied Syncrude's objections and issued a Statement of No Resolution.[122] Unlike in *Shell*, the Minister appointed a Dispute Resolution Committee by Ministerial Order. The Committee's report recommended that the Minister allow almost all the disputed costs.

The Minister rejected almost all the Committee's recommendations. Syncrude sought judicial review.

## 3. DECISION

At first instance, Justice Hollins held that the applicable standard of review for the Minister's decision, in light of *Canada (Minister of Citizenship and Immigration) v. Vavilov*,[123] was reasonableness.[124]

The Minister argued that the statute gave her broad discretion to review the Committee's recommendations and to "make a decision to accept, reject or vary the recommendations of the committee."[125] Justice Hollins held that this did not exempt the Minister from "the common law obligation that her decision must be reasonable, both in the path to the result and in the result."[126] The Minister's reasons had to, at a minimum, permit meaningful judicial review.

Justice Hollins quashed the Minister's decision, faulting the Minister for not sufficiently explaining her reasoning for rejecting the Committee's recommendations. She noted that "[i]t is reminiscent of Justice Renke's comments … that '[s]imply repeating factors without showing how the factors were applied amounts to saying, 'I considered everything – trust me.'''"[127]

In terms of remedy, Justice Hollins remitted the matter to the Minister for reconsideration, rather than directing the Minister to accept the Committee's recommendations. She distinguished decisions where it was appropriate for the Court to direct the administrative decision-maker to make a particular decision — as Justice Hall did in *Shell* in directing the

119 2024 ABCA 366 [*Syncrude* ABCA].
120 *Ibid* at para 1.
121 *Syncrude Canada Ltd v Alberta (Energy)*, 2023 ABKB 317 [*Syncrude* ABKB], aff'd 2024 ABCA 366.
122 *Ibid* at para 3.
123 2019 SCC 65 [*Vavilov*].
124 *Syncrude* ABKB, *supra* note 121 at para 40, citing *ibid* at para 25.
125 *Ibid* at paras 122–23.
126 *Ibid* at para 124.
127 *Ibid* at para 134.

Minister to constitute a committee — from those decisions where the Court lacks the expertise, the decision does not lend itself to only one interpretation, or the result is not inevitable. For example, here, the Minister could allow some but reject other recommendations or "come to the same conclusion again but with more transparent reasoning."[128]

Syncrude's appeal to the Court of Appeal on remedy alone was dismissed, with the Court finding that Justice Hollins correctly examined the facts and law, including those legal principles applicable to remedy.[129]

### 4. COMMENTARY

The *Syncrude* cases are a helpful reminder of two important administrative law principles.

First, even a grant of broad discretion to a Minister of the Crown to make administrative decisions does not insulate the decision from judicial review, or from the requirement to provide reasons that meet the test for justification, transparency and intelligibility. While the Minister provided reasons in the Court of King's Bench decision, the Court went to some length to assess whether the reasoning contained logical explanations for the ultimate decision.

Second, it is a helpful reminder that remedial limits imposed by *Vavilov* mean that judicial reviews can result in pyrrhic victories. Generally, it "will most often be appropriate" to remit the matter back to the decision-maker.[130] Of course, there is always the possibility that the decision-maker will change the result. But that hope might seem hollow, especially once the Court has already determined that the decision-maker exercised their statutory powers unreasonably.

## C. *MEG ENERGY CORP. V. ALBERTA (MINISTER OF ENERGY)*

### 1. BACKGROUND

In *MEG Energy Corp. v. Alberta (Minister of Energy)*,[131] the company, MEG, sought judicial review of a decision by the Minister to dismiss MEG's appeal of Alberta Energy's decision regarding royalties owed by MEG to the Crown. Under the general royalty regime, MEG must pay royalties to the Crown under the *Mines and Minerals Act*[132] and the *Oil Sands Royalty Regulation, 2009*.[133]

The regime operates on a self-reporting basis which requires MEG to prepare and submit an annual report on its royalty calculations to the Minister. The Minister may review or audit the calculation and determine to disallow or change components of the calculation. MEG

[128] *Ibid* at para 144.
[129] *Syncrude* ABCA, *supra* note 119 at para 16.
[130] *Ibid* at para 8, citing *Vavilov*, *supra* note 123 at paras 140–42.
[131] 2024 ABKB 592 [*MEG*].
[132] RSA 2000, c M-17.
[133] Alta Reg 223/2008.

took issue with Alberta Energy's decision to disallow certain handling charges in calculating the royalites MEG owed to the Crown.[134]

2. FACTS

MEG sought judicial review on several grounds, including that the audit was completed outside of the time limits required by statute,[135] and that the process raised a reasonable apprehension of bias, as the Director (the Minister's delegate) engaged in *ex parte* discussions with the audit group at Alberta Energy and provided them with a preview of his decision.[136] In addition to these procedural arguments, MEG also argued that the Director's decision was substantively unreasonable on several grounds.

MEG also sought judicial review on the basis that the Minister had issued two Ministerial Orders purporting to extend the limitation period on the audit but had never disclosed these orders to MEG until the judicial review began.[137]

3. DECISION

Justice Eamon allowed certain aspects of the claim, but dismissed others, remitting the matter back to the Minister for consideration.

Justice Eamon found that MEG was only entitled to a low standard of procedural fairness in its appeal to the Director.[138] While the Court criticized a number of actions by the Director, including his communications with the audit team whose decision he was reviewing, the Court ultimately found that this was not a breach of this low standard of procedural fairness and that the Director "may communicate with the [auditors] in the absence of" the operator.[139] The Court found that this was permissible as long as the Director does not seek out additional evidence from the audit group. However, he noted that his decision should not be a "suggestion that the Director's failure to minute or record his meeting with the auditors was a prudent practice."[140] Similarly, the "review of the Director's draft decision by an auditor is concerning but [did] not rise to the level of reasonable apprehension of bias."[141]

The Court also found that the failure to disclose the Ministerial Orders was a breach of procedural fairness, but declined to grant a remedy given what the Court found was a largely inconsequential breach.[142]

On substantive grounds, Justice Eamon dismissed two of MEG's challenges,[143] but held that the Director unreasonably failed to consider the wording of the governing regulations in

134 *MEG*, *supra* note 131 at paras 1–11.
135 *Ibid* at paras 115–54.
136 *Ibid* at paras 249–93.
137 *Ibid* at para 155.
138 *Ibid* at para 258.
139 *Ibid* at para 285.
140 *Ibid* at paras 271, 293.
141 *Ibid* at para 286.
142 *Ibid* at para 192.
143 *Ibid* at paras 415–20.

denying the costs of diluent tanks.[144] As such, there were "serious gaps in his reasoning process that the Court cannot supplement."[145] He also found that the Director did not justify departing from established internal authority on this point.[146]

## 4. COMMENTARY

MEG has appealed the aspects where it was unsuccessful to the Court of Appeal[147] and the diluent tank issue was sent back to the Director for reconsideration. Other originating applications by other operators for judicial review of similar decisions of the Director remain outstanding and are currently before the Court.

An important issue that arose here was the degree of procedural fairness owed to industry members by the Director on an appeal of an audit decision. The Court found that only a low level of procedural fairness was owed, primarily because the consequences of the decision were economic. This conclusion was recently criticized by Justice Feasby in *Imperial Oil Resources Limited v. Alberta (Minister of Energy)*,[148] who disagreed on two points: (1) if the consequences of a decision were purely economic that this warranted only a low degree of procedural fairness; (2) and that the decision of the Director attracted the same level of procedural fairness as a decision of the audit group.[149] This issue will be left to the Court of Appeal to resolve on appeal.

Recent developments suggest that the Ministry may be taking steps to support a more robust appeal process of audit decisions. In 2024, the Ministry created and staffed a Proceedings Management Branch, with an Executive Director. The branch is staffed by directors, managers, and policy advisors to strategically manage matters before the courts and tribunals, including responses to and resolution of matters brought against the Department. As described the by Ministry, the branch "will lead negotiated settlements, ensure the timely passage of files through the statutory decision-makers and develop and adhere to processes that reduce the overall costs of litigation and other matters."[150]

Within the Proceedings Management Branch, there is a Judicial Reviews Unit, led by a Director. The Judicial Reviews Unit undertakes research and analysis, works with legal counsel in responding to requests for judicial review of department decisions, and supports the Department's statutory decision-makers in achieving consistent, fair, and effective administration of Energy and Minerals' areas of responsibility. This will potentially result in more consistent and robust decisions by Alberta Energy.

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144 *Ibid* at paras 422–29.
145 *Ibid* at para 431.
146 See e.g. *ibid* at paras 432–41.
147 Court of Appeal of Alberta, Appeal No 2401-0294AC.
148 2025 ABKB 303.
149 *Ibid* at paras 21–22.
150 Government of Alberta, "Job Description – Policy Analyst – Energy and Minerals" (2022), online (pdf): [perma.cc/8DWV-78FE].

## V. INTELLECTUAL PROPERTY AND TECHNOLOGY

### A. *JL ENERGY TRANSPORTATION INC. V. ALLIANCE PIPELINE LIMITED PARTNERSHIP*

#### 1. BACKGROUND

*JL Energy Transportation Inc. v. Alliance Pipeline Limited Partnership*[151] will be of interest to companies that act as either a licensor or licensee of technology in the energy industry. Specifically, it teaches valuable lessons about forum selection clauses in technology licences, particularly when patented technology is at play.

#### 2. FACTS

JL Energy Transportation Inc. (JL Energy) is the owner of Canadian Patent No. 2,205,670 (the 670 Patent), titled "[P]ipeline transmission method," which generally claims a method for transmitting natural gas by pipeline.[152] JL Energy had licensed its patented technology to the owners of the Alliance Pipeline (Alliance). However, a dispute arose, and JL Energy alleged that Alliance had used the patented technology outside the terms of the licence.[153] Specifically, JL Energy alleged that Alliance had used its patented technology on the Septimus pipeline located in northeastern British Columbia — an act which was not covered by the licence (the Alleged Septimus Infringement).[154] JL Energy sued for patent infringement and breach of the licence agreement in the Court of King's Bench of Alberta.

Alliance applied to summarily dismiss JL Energy's claim as being out of time under the Alberta *Limitations Act*. JL Energy argued that because patent infringement actions are governed by the *Patent Act*,[155] the Alberta *Limitations Act* was not applicable, and that the six-year limitation period under section 55.01 of the *Patent Act* should apply instead.[156]

#### 3. DECISION

At first instance, the Court of King's Bench applied the Alberta *Limitations Act*, and summarily dismissed JL Energy's claim.[157] The Court held that the shorter Alberta *Limitations Act* was the applicable limitation period for patent infringement claims brought in Alberta, and that the longer six-year limitation period in the *Patent Act* did not apply. The application judge noted that she was bound to make this holding based on a Court of Appeal of Alberta decision — *Secure Energy Services Inc. v. Canadian Energy Services Inc.*[158] —

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151 2025 ABCA 26 [*JL Energy* ABCA], leave to appeal to SCC refused, 2025 CanLII 71471 (SCC).

152 *JL Energy Transportation Inc v Alliance Pipeline Limited Partnership*, 2024 ABKB 72 [*JL Energy* ABKB], rev'd on other grounds in *JL Energy* ABCA, *supra* note 151 at paras 18–19.

153 *Ibid* at para 3.

154 *Ibid* at para 25. JL Energy also alleged that Alliance was infringing its corresponding US Patent in association with the Prairie Rose and Tioga pipelines in North Dakota; however, those patent infringement claims were struck at first instance for lack of jurisdiction, and JL Energy did not appeal (*ibid* at para 7).

155 RSC 1985, c P-4 [*Patent Act*].

156 *JL Energy* ABKB, *supra* note 152 at para 46.

157 *Ibid* at para 127.

158 2022 ABCA 200 [*Secure*].

wherein the Court held that the Alberta *Limitations Act* applies to patent infringement claims brought in Alberta.[159] This is based on section 12(1) of the Alberta *Limitations Act* which states that "[t]he limitations law of Alberta applies to *any* proceeding commenced or sought to be commenced in Alberta in which a claimant seeks a remedial order."[160]

JL Energy appealed to the Court of Appeal. As part of its appeal, JL Energy first brought a preliminary reconsideration application where it was granted leave to argue that *Secure* should not be followed.[161] At the hearing on the merits, a rare five-member panel agreed with JL Energy,[162] and ruled that the applicable limitation period for patent infringement claims brought in Alberta is the six-year limitation period in the *Patent Act*.[163] The Court of Appeal found that the Court in *Secure* erred by focusing on a literal interpretation of section 12(1) of the *Limitations Act*.[164] At JL Energy's appeal, the Court examined the history of the *Limitations Act* and its words as a whole, and in doing so found that the *Limitations Act* does not apply to causes of action created by federal statutes.[165]

### 4. COMMENTARY

*JL Energy* is an interesting case for energy lawyers for a number of reasons: (i) it suggests that licensees and licensors should give careful consideration to forum selection (or attornment) clauses when licensing patented technology to avoid confusion about the appropriate forum and corresponding law for the patent litigation claim; and (ii) it serves as a reminder that appellate courts can reconsider their previous decisions.

#### (i) Consider carving out patent infringement claims in attornment clauses

In the licence between JL Energy and Alliance, the parties had attorned to the jurisdiction of Alberta,[166] which likely played a role in JL Energy's choice to pursue its action in Alberta rather than in the Federal Court. Indeed, the Federal Court of Canada has no adjudicative jurisdiction to hear a pure breach of a licence claim.[167] Therefore, if JL Energy wanted both the licence claim and the patent infringement claim to be heard together, it had no choice but to pursue its claim in Alberta.[168]

However, as raised by the Alberta Court of Appeal, there appeared to be no reason for JL Energy to claim both patent infringement and a breach of licence. Rather, JL Energy could

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159 *JL Energy* ABKB, *supra* note 152 at para 49, citing *ibid* at paras 16–24.

160 *Limitations Act*, *supra* note 56, s 12(1), quoted in *JL Energy* ABCA, *supra* note 151 at paras 49–51; *Secure*, *supra* note 158 at para 19 [emphasis added].

161 *Alberta Rules of the Court*, Alta Reg 124/2010, r 14.46 [*Alberta Rules of Court*]; see *JL Energy Transportation Inc v Alliance Pipeline Limited Partnership*, 2024 ABCA 175.

162 *JL Energy* ABCA, *supra* note 151 at paras 30, 46.

163 *Ibid* at paras 1, 32.

164 *Ibid* at para 12.

165 *Ibid* at para 32.

166 *JL Energy* ABKB, *supra* note 152 at para 24.

167 *McCain Foods Limited v JR Simplot Company*, 2021 FCA 4 at para 98.

168 It is unlikely that the attornment clause specifically required claims related to the 670 Patent to be brought in Alberta, given that the licence was entered into on 10 May 1996 (*JL Energy* ABKB, *supra* note 152 at para 20), prior to the filing of the patent application on 16 May 1997, and well before the patent was granted on 16 November 1999 (see "Pipeline Transmission Method", Can Patent No 2205670 (18 July 1997)).

have simply claimed patent infringement.[169] The Court of Appeal noted there were likely "more robust" remedies for the patent infringement claim (including the potential of an accounting of profits), as compared to only a breach of contract claim (generally, expectation damages only).[170] The Court of Appeal also noted that the licence would likely be more applicable to Alliance as a "shield" (as a defence to patent infringement), compared to a "sword" (as a claim) for JL Energy.[171]

The Court of Appeal's comments beg the question whether it would have been more obvious to JL Energy to bring its claim in the Federal Court, if it had restricted its claim to an action for patent infringement from the outset? Generally, most patent infringement claims (and other IP claims, such as trademark and copyright) are brought in Federal Court over the provincial courts for several reasons: judicial expertise,[172] the availability of Canada-wide remedies, and a lack of concern regarding extra-provincial enforcement of judgments.[173] Had JL Energy brought its claim in the Federal Court, it likely could have avoided the limitation period battle and the case would have been significantly simplified from the beginning.

This is not to say that it is never appropriate to bring an action for patent infringement in provincial court. Indeed, section 54 of the *Patent Act* gives concurrent adjudicative jurisdiction to both the Federal Court and provincial courts, giving litigants the option to pursue patent infringement claims in "the province in which the infringement is said to have occurred."[174] Indeed, it is often only recommended to bring an IP claim in provincial court if the alleged infringement is restricted to the province in which you are bringing your claim. Oddly enough, in JL Energy's case, the Alleged Septimus Infringement was in British Columbia, and not Alberta where JL Energy brought its claim. Arguably, JL Energy sued in the wrong forum altogether, and should have brought its claim in British Columbia.

Overall, the limitations saga in *JL Energy* demonstrates that licensees and licensors should pay careful attention to forum selection clauses when drafting technology licences. A clear attornment clause in the licence may have avoided the confusion that emerged in the *JL Energy* case. Further, engaging sophisticated patent litigation counsel early in a lawsuit can help avoid complicated procedural issues on the appropriate forum and applicable law.

(ii) Appellate courts can reconsider their previous decisions

The appeal decision in *JL Energy* is also an interesting reminder that courts will acknowledge when their previous decisions need to be revisited. The Alberta Court of Appeal in *JL Energy* was not afraid to acknowledge that *Secure* (one of its earlier decisions) should no longer be followed on the limitations issue. Indeed, appellate courts throughout the

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169 *JL Energy* ABCA, *supra* note 151 at para 41.
170 *Ibid* at para 42.
171 *Ibid* at para 40.
172 See generally Federal Court, "Notice to the Parties and the Profession – Pilot Project: Chambers of the Court" (2 March 2023), online (pdf): [perma.cc/D54H-2ZHN].
173 *Secure*, *supra* note 158 at para 9.
174 *Patent Act*, *supra* note 155, s 54(1).

country have mechanisms to allow parties to argue that a previous appellate decision should not be binding.[175]

## B. *MUD ENGINEERING INC. V. SECURE ENERGY SERVICES INC.*

### 1. BACKGROUND

*Mud Engineering Inc. v. Secure Energy Services Inc.*[176] unpacks employer-employee ownership disputes over patents. It offers several refresher lessons to energy lawyers about how to best preserve and assert patented inventions.

### 2. FACTS

The main issue in the *Mud Engineering* cases was about who owned the rights in two disputed patents relating to drilling fluid compositions for bitumen recovery (the Disputed Patents). The listed inventor of the Disputed Patents was Mr. Wu, and their listed owner was Mud Engineering Inc. (Mud).[177]

Mr. Wu was employed by Marquis Fluids Inc. (Marquis) for almost five years. Marquis was later acquired by Secure Energy Services Incorporated (Secure Energy). During Mr. Wu's employment for Marquis, he developed a drilling fluid that had become the subject matter of two earlier patents (Secure's Patents), which he assigned to his employer based on the contractual obligations set out in his employment agreement.[178] After Mr. Wu's resignation, he incorporated Mud and filed patent applications for the Disputed Patents.[179]

Subsequently, Mr. Wu became aware that Secure Energy was using drilling fluids covered by the Disputed Patents. Mr. Wu brought an action against Secure Energy for patent infringement at the Federal Court. As part of the underlying patent infringement action, Mr. Wu brought a motion for summary trial for a declaration of ownership.[180] Secure Energy alleged that it owned the Disputed Patents and counterclaimed for a competing declaration of ownership.[181] Secure Energy argued that the Disputed Patents were essentially the same as Secure's Patents, or that Mr. Wu came up with the Disputed Patents using knowledge of Secure's Patents, and thus, Mud could not be the owner of the Disputed Patents.[182]

### 3. DECISION

While the Federal Court acknowledged the presumption of ownership in favour of Mud (the listed owner) based on the patent records and section 43(2) of the *Patent Act*, it stated that the presumption was "weak" and could be rebutted by evidence.[183] The Federal Court

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175 *Alberta Rules of Court*, *supra* note 161, rr 14.46, 14.72; see also *Miller v Canada,* 2002 FCA 370 at paras 10–21.
176 2024 FCA 131 [*Mud Engineering* FCA].
177 *Ibid* at para 56.
178 *Mud Engineering Inc v Secure Energy (Drilling Services)*, 2022 FC 943 at paras 43–44 [*Mud Engineering* FC].
179 *Ibid* at paras 57–60.
180 *Ibid* at para 1.
181 *Ibid* at paras 2, 107.
182 *Ibid* at paras 79–80.
183 *Ibid* at paras 64, 89.

required each party to prove its ownership on a balance of probabilities.[184] Secure Energy tendered expert evidence highlighting the similarities between the Disputed Patents and Secure's Patents.[185] In contrast, Mud relied heavily on factual evidence from Mr. Wu (the listed inventor of the Disputed Patents). The Court found Mr. Wu to be an uncredible witness and held that he did not have any pertinent supporting documentation to demonstrate that he developed the Disputed Patents.[186] Somewhat peculiarly, the Federal Court ruled that neither party owned the Disputed Patents. Secure Energy ultimately prevailed because, as a result of the Court's ruling, Mud did not own the Disputed Patents against Secure Energy and as such lost standing to sue for infringement. Consequently, its underlying patent infringement action against Secure Energy was dismissed.[187]

Only Mud and Mr. Wu appealed. Their primary argument was that it was an "absurd result" that no one owned the Dispute Patents, and hence, no one could sue for patent infringement.[188] The majority of the Federal Court of Appeal clarified that, in appropriate circumstances, Mr. Wu and Mud were not without a remedy for infringement as the ownership declaration is binding only between Mr. Wu, Mud, and Secure Energy, not against third parties.[189]

## 4. COMMENTARY

Energy lawyers from companies with a focus on research and development should be aware of three specific lessons arising from *Mud Engineering*: (i) ensure robust inventorship training for those developing new technologies; (ii) ensure employee ownership assignment clauses are unambiguous and unequivocal; and (iii) be aware of summary trial pitfalls in patent litigation.

### (i) Train Research & Development (R&D) employees on inventorship and have a robust invention disclosure process

While enforcing a patent in court is often a last resort, *Mud Engineering* serves as a warning that a robust invention disclosure process is critical. These cases are a reminder that an ownership attack may be a successful defensive strategy to a patent infringement claim. If a claimant asserts that you do not own the patent, you will need to tender evidence to prove that you are, in fact, the owner. Depending on the facts of your case, the best evidence will likely come from those in R&D who developed the invention, including specific details on what they did, when they did it, and their results. Litigation often takes place years after the inception of the invention, and documentary evidence recorded at the time the invention was conceived will be helpful in preparing evidence years later. In the *Mud Engineering* litigation, Mud and Mr. Wu lost ownership of the patent due to Mr. Wu's "dearth of evidence" of

184 *Ibid* at para 64.
185 *Ibid* at para 89.
186 *Mud Engineering* FCA, *supra* note 176 at para 30.
187 *Mud Engineering* FC, *supra* note 178 at para 149.
188 *Mud Engineering* FCA, *supra* note 176 at para 17.
189 *Ibid* at paras 19.

ownership and inventorship.[190]A robust invention disclosure process would have perhaps saved Mud and Mr. Wu.

(ii) Review employee ownership assignment provisions

*Mud Engineering* is also a cautionary tale to ensure that invention ownership assignment clauses in employment agreements are properly worded. In this case, Secure Energy argued that it owned the Disputed Patents because its employment agreement with Mr. Wu expressly required him to assign his inventions. The agreement provided that "any intellectual property developed by the employee … in the course of the discharge of his employment duties, is the property of the corporation."[191] However, Secure Energy's evidence based on the wording of the employment agreement did not satisfy the Court that Secure Energy was the rightful owner of the Disputed Patents. The Court focused on the fact that Secure Energy did not "explain, nor establish that working in the subject-matter of the Disputed Patents … equates to 'the developing of an invention in the course of the discharge of [Mr. Wu's] employment duties.'"[192] The Court was not prepared to infer from the wording of the assignment clause that the assignment applied to the specific invention claimed in the Disputed Patents.[193] The wording of an assignment clause should always ensure that the definition of the employee's duties is broad and captures any invention tangentially related to those duties.

(iii) Summary trial pitfalls in patent litigation

A pitfall of conducting summary trials at the Federal Court is the lingering uncertainty regarding which party bears the legal burden of proof. The majority and the dissent at the Federal Court of Appeal disagreed as to which party should bear the burden of proving ownership on a summary trial. The majority recognized that there is conflicting Federal Court jurisprudence on this issue but stated that this was not a case in which the issue had to be decided.[194] This was despite the motion judge's express recognition that "the determination of where the burden lies on a motion for summary trial is dispositive in these proceedings."[195]

After the motion judge accepted that Secure Energy presented "some evidence" that displaced the presumption that Mr. Wu was the true inventor and Mud the true owner, she required them to prove ownership on balance of probabilities.[196] But conflicting precedent of the Federal Court suggests that the legal burden of proof in summary trials is the same as that in the underlying action.[197] Had Mud and Mr. Wu not severed the issue of ownership from the main infringement action, the burden would have been on Secure Energy to prove that Mud was not the true owner. However, because they sought a declaration of ownership on a motion for summary trial, they had to prove their allegations and establish that Mr. Wu, the listed inventor, created the invention — which they failed to do on the evidence.

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190 *Ibid* at para 13.
191 *Mud Engineering* FC, *supra* note 178 at para 45.
192 *Ibid* at para 144 [emphasis removed].
193 *Ibid* at para 118.
194 *Mud Engineering* FCA, *supra* note 176 at para 38.
195 *Mud Engineering* FC, *supra* note 178 at para 35.
196 *Ibid* at paras 89–90.
197 *Ibid* at paras 18–28.

Summary trials are appealing to litigants as they expedite a dispute. But in the Federal Courts the unresolved question of where the burden of proof lies poses a challenge for businesses and lawyers alike as it may hinder effective assessment of litigation risks and strategy.

## C. *TELUS COMMUNICATIONS INC. V. FEDERATION OF CANADIAN MUNICIPALITIES*

### 1. BACKGROUND

In *Telus Communications Inc. v. Federation of Canadian Municipalities*,[198] the Supreme Court addressed the process of statutory interpretation and the role of courts in adapting legislation to new technology. This case involved an appeal from Canadian telecommunications carriers (the Carriers) who sought to have 5G small cells be classified as "transmission line[s]."[199] The main reason for seeking this classification was because it would provide the Carriers with an avenue to apply to the Canadian Radio-television and Telecommunications Commission (CRTC) for terms of access under the *Telecommunications Act*, which would allow the Carriers to compel municipalities to locate 5G towers in areas under dispute.[200]

### 2. FACTS

In 2019, the CRTC issued a notice of consultation to review wireless mobile services and the regulatory framework. One of the main topics of discussion was reducing barriers for 5G infrastructure. 5G small cells need to be installed onto existing structures like bus shelters and telephone poles, which are typically public property.[201] Under section 43 of the *Telecommunications Act*, if Carriers are unable to negotiate terms of access with the relevant municipality or public body, they may go through the CRTC to obtain terms of access.[202] However, this only applies if 5G small cells are considered a "transmission line."[203]

Both the CRTC and Federal Court of Appeal adopted a narrow interpretation of "transmission line" and found that 5G small cells are not included within this definition. As such, the CRTC had no authority to grant terms of access and the Carriers' only option for building out this infrastructure was to negotiate with the municipalities.

### 3. DECISION

The majority, applying the modern approach to statutory interpretation, concluded that "transmission line" should be interpreted narrowly and that 5G small cells did not fall under this definition.[204] The majority found that the grammatical and ordinary meaning of "line" typically contemplated a "physical and tangible pathway," which excluded 5G small cells

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198 2025 SCC 15 [*Telus*].
199 *Ibid* at para 2.
200 SC 1993, c 38; *Telus*, *supra* note 198 at para 1.
201 *Telus*, *supra* note 198 at para 8.
202 *Ibid* at para 10; *Telecommunications Act*, *supra* note 200, s 43.
203 *Telecommunications Act*, *supra* note 200, s 43.
204 *Telus*, *supra* note 198 at para 86.

which are antennas that transmit waves in all directions.[205] This was unaffected by the fact that 5G small cells are hard-wired to wireline equipment.[206] The majority also found that section 43 of the *Telecommunications Act* allowed Carriers to break up public property, which would be inapplicable to 5G small cells, which "cannot be buried 'under' or run 'along' public property."[207] The Court also noted that antennas transmit waves and it is nearly impossible to alter the "route" of an antenna, suggesting that such technology was not within the definition of "transmission line."[208]

The Court also considered the access regime in which such technology operated. The *Telecommunications Act* defines "transmission facility," which includes wireless technology, but in the relevant sections of the legislation, Parliament opted to use the undefined term of "transmission line."[209] This supported the conclusion that Parliament knew that wireless technology existed at the time the legislation was enacted and deliberately chose to use a different term in section 43. As such, the Court found that Parliament's intention was for "transmission line" to refer only to wireline technology.[210]

Ultimately, while the Court acknowledged that the "law is 'always speaking'" and courts must make efforts to apply it to modern situations in accordance with parliamentary intent at the time of enactment,[211] this did not mean that the Court should overstep its role and change the law. Rather, it fell to Parliament to legislate in ways that would accommodate this new technology.

The dissent provided a different understanding and found that the modern approach to statutory interpretation favoured a broad interpretation of "transmission line," ultimately finding that 5G cells are "transmission lines." One of the primary arguments for the dissent was that the majority's interpretation created absurd consequences. In effect, it found that Parliament intended for Canada to have efficient and effective telecommunications, which would facilitate access for Carriers to carry out the necessary technological upgrades to develop the country's telecommunications networks.[212] To find otherwise would be to limit Carriers' ability to fulfill this goal by eliminating their recourse to the CRTC if a municipality declined to allow access to the structures on which 5G cells would be mounted.[213]

### 4. COMMENTARY

While this case is not directly applicable to energy companies, it provides helpful insight on the role of courts and how statutory interpretation will apply when considering new technology in accordance with the text of the legislation and Parliament's original intention. It is not the role of the courts to effectively rewrite legislation to accommodate new technology. Rather, it is up to Parliament to make legislative changes to address technological

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205 *Ibid* at paras 44–45.
206 *Ibid* at para 46.
207 *Ibid* at para 50.
208 *Ibid*.
209 *Ibid* at para 18.
210 *Ibid* at para 67.
211 *Ibid* at para 34, citing the *Interpretation Act*, RSC 1985, c I-21, s 10.
212 *Telus*, *supra* note 198 at paras 161–63.
213 *Ibid* at para 161.

evolution. While the majority took a narrow view of the role of the Court in adapting old legislation to new circumstances, the dissent arguably flirted with making legislative changes.

## VI. ASSIGNMENTS

### A. *CANADIAN NATURAL RESOURCES LIMITED V. HARVEST OPERATIONS CORP.*

#### 1. BACKGROUND

In *Canadian Natural Resources Limited v. Harvest Operations Corp.*,[214] the Alberta Court of Appeal applied the Supreme Court of Canada's determination in *Orphan Well Association v. Grant Thornton Ltd.* (commonly referred to as *Redwater*),[215] which considered the legal nature of, and liability for, the end-of-life obligations associated with oil and gas assets. This has placed renewed importance on the assignment of oil and gas assets to ensure that assignees have the ability to meet future financial obligations regarding jointly held assets.

#### 2. FACTS

Harvest Operations Corp. (Harvest) sought to assign its interest in 170 oil and gas agreements with Canadian Natural Resources Limited (Canadian Natural) to Spoke Resources Ltd. (Spoke), which included land, facility, and service agreements, following an asset purchase and sale agreement between Harvest and Spoke.

Canadian Natural was concerned about Spoke's ability to meet future financial obligations and declined to consent to the assignment unless Spoke provided satisfactory evidence of its ability to either "meet future financial obligations or an irrevocable letter of credit from Spoke to cover expected abandonment and reclamation obligations."[216]

Harvest and Spoke both took the position that their assignments were consent exempt. As Harvest's agent, Spoke issued default notices to Canadian Natural alleging that Canadian Natural was "in default under the Operatorship Agreements for withholding consent to the assignment of interests to Spoke."[217]

At the Court of King's Bench of Alberta, Canadian Natural sought a declaration that Harvest's assignments were of no force and effect. Harvest and Spoke counterclaimed, seeking a declaration that the assignments were valid and that Spoke was the valid assignee.

Canadian Natural also applied to set aside the default notices, and Harvest and Spoke cross-applied for partial summary judgment relating to 114 oil and gas agreements. These agreements "either require[d] no consent, deem[ed] consent where the non-consenting party failed to exercise a right of first refusal… or there [was] a contractually enumerated exception

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[214] 2024 ABCA 3 [*CNRL* ABCA], leave to appeal to SCC refused, 2024 CanLII 74739 (SCC).
[215] 2019 SCC 5 [*Redwater*].
[216] *CNRL* ABCA, *supra* note 214 at para 5.
[217] *Canadian Natural Resources Limited v Harvest Operations Corp*, 2023 ABKB 62 at para 12 [*CNRL* ABKB].

to consent."[218] The remaining 56 agreements had different terms that clearly required Canadian Natural's consent.

3. DECISION

Justice Johnson of the Court of King's Bench of Alberta set aside the default notices because Canadian Natural "was not the operator at the time the notices were issued."[219] She held that the applicable 1981 and 1990 Canadian Association of Petroleum Landmen (CAPL) Operating Procedures and the 1999 Petroleum Joint Venture Association Operating Procedure (PJVA) drew "a distinction between an operator and an owner or party to the [underlying oil and gas agreements]."[220]

Justice Johnson also held that it was appropriate to grant partial summary judgment regarding those agreements that were consent exempt because "there is no basis to set aside the contractual agreements. Parties must live with the consequences of the bargain they strike."[221] She held that under 19 facility agreements, consent was deemed or not required.[222] In interpretating the 1981 and 1990 CAPL Operating Procedures applicable to the 96 land agreements, she held that they did not require consent if there was a disposition by a party in which the net land being disposed of represented less than 5 percent of the total amount that party was disposing.[223] She interpreted the 5 percent exemption as applying on an agreement-by-agreement basis, with reference to the total land contemplated in a disposition.[224] While the cumulative total land being disposed of was over 26 percent of the joint lands, none of the individual agreements exceeded the 5 percent threshold.[225]

The Court of Appeal reversed the decision and set aside summary judgment for all 114 agreements, directing that the issues relating to the validity of these assignments go to trial.[226]

The Court of Appeal held that partial summary judgment was inappropriate in the circumstances because the purchase and sale agreement was a single "white map" transaction, such that it was not possible to easily bifurcate the agreements with exemption clauses from those agreements that required Canadian Natural's consent.[227] In particular, the record did not clearly establish which facility agreement correlated to which land agreements, making it unclear whether there was the necessary "symmetry between the facility interest … and the corresponding production flowing to the facility."[228]

Regarding the 5 percent exemption, the Court of Appeal held that there was a genuine issue requiring a trial.[229] In order to ensure that the interpretation of the clauses led to a sensible commercial result, a "full evidentiary record" was required describing the "purpose

218 *Ibid* at para 54.
219 *Ibid* at para 19.
220 *Ibid* at para 20.
221 *Ibid* at para 53.
222 See generally *ibid* at paras 74–85.
223 *Ibid* at paras 59–60.
224 *Ibid* at paras 65–73.
225 *Ibid* at paras 64, 71–73.
226 *CNRL* ABCA, *supra* note 214 at para 28.
227 *Ibid* at para 21.
228 *Ibid* at paras 20–22.
229 *Ibid* at para 23.

of the contracts, the nature of the relationship they created, and the market and industry in which these agreements operate[d]."[230]

### 4. COMMENTARY

This case provides helpful guidance on structuring oil and gas agreements. Specifically, it suggests that the validity of certain contracts requiring explicit consent prior to assignment may impact the interpretation of other agreements in which this is not clear. Would a different agreement structure, perhaps involving several purchase and sale agreements, or without a single white map approach, lead to a different result?

The Court of Appeal's conclusion, that it required detailed information regarding the surrounding circumstances of the individual agreements before it could interpret them, is a reminder of the heavy burden placed on a party moving for summary judgment.

Notably, the Court of Appeal held that the CAPL and PJVA exemption clauses were standard form clauses whose interpretation was of clear precedential value, such that the standard of review was correctness rather than the default of reasonableness.[231] It is also notable that the Court of Appeal applied a correctness standard of review to standard form *clauses* rather than to standard form *contracts*. It broadens the scope of appellate intervention in oil and gas contractual disputes, which frequently rely on standard form clauses.

## B. *ENMAX CORPORATION V. INDEPENDENT SYSTEM OPERATOR (ALBERTA ELECTRIC SYSTEM OPERATOR)*

### 1. BACKGROUND

In 2005, the Alberta Electric System Operator (AESO), which operates as the Independent System Operator under the *Electric Utilities Act*,[232] implemented a line loss rule for calculating transmission loss factors as part of recovering the cost of transmission line losses from market participants (the 2005 Line Loss Rule).[233]

In 2014, the Alberta Utilities Commission (AUC) determined that the 2005 Line Loss Rule was contrary to the legislation.[234] This meant that the Commission had to recalculate transmission line loss charges and credits that were unlawfully imposed under the 2005 Line Loss Rule, which resulted in some market participants being owed credits.[235]

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230 *Ibid* at paras 23–24.
231 *Ibid* at para 15.
232 SA 2003, c E-5.
233 *Enmax Corporation v Independent System Operator (Alberta Electric System Operator)*, 2024 ABCA 83 at para 4 [*Enmax*].
234 *Ibid* at para 4.
235 *Ibid*.

### 2. FACTS

Between 2003 and 2006, the AESO and Calpine Energy Services Canada Partnership (Calpine) were parties to two supply transmission service agreements regarding a power generation asset (the Facility).[236]

Sometime in 2007, Calpine assigned its interests in the supply transmission service agreements for the Facility to Calgary Energy Centre No. 1 Inc., which ultimately came under Enmax Corporation's ownership.[237]

The AUC held proceedings, involving market participants like Enmax Corporation, which set out rules as to whom the AESO should issue credits. These proceedings determined that invoices must be issued to the original cost causers and cost savers "because they were the parties unjustly and unduly advantaged or disadvantaged by the unlawful interim rates."[238]

In furtherance of the AUC's decision, the AESO calculated a total refund of over $11 million owing for the Facility.[239] Of that total, it refunded over $3 million to Enmax Corporation for the period of 1 January to 31 July 2007.[240] "It attempted to refund the balance to Calpine as the holder of the [supply transmission service agreements] between February 1 to December 31, 2006, but Calpine had been dissolved."[241]

Enmax Corporation applied to the Court of King's Bench of Alberta for an order directing the AESO to pay the balance of Calpine's credit to it.

### 3. DECISION

Justice Malik of the Court of King's Bench of Alberta dismissed Enmax Corporation's application on the basis of res judicata (specifically issue estoppel), finding that the AUC "had determined that only the 'original cost causers and cost savers' were entitled to receive the credit amount."[242] He also determined that the AUC's decision was final, had not been appealed, and the hearing involved the same parties that were the subject of the AUC's decision.[243]

The Court of Appeal dismissed Enmax Corporation's appeal of Justice Malik's decision and held that his conclusions were correct. In particular, it concluded that the AUC's decision was that "the AESO must issue the credit to the party that held the [supply transmission service agreements] at the relevant time," triggering the doctrine of issue estoppel because both Enmax Corporation and the AESO were parties to the AUC proceedings.[244]

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236 *Ibid* at para 5.
237 *Ibid* at paras 7, 9.
238 *Ibid* at para 12 [emphasis removed].
239 *Ibid* at para 14.
240 *Ibid*.
241 *Ibid*.
242 *Ibid* at para 20; *ENMAX Corporation v Independent System Operator (Alberta Electric System Operator)*, 2023 ABKB 191 at para 36 [*Enmax* ABKB].
243 *Enmax* ABKB, *supra* note 242 at para 36.
244 *Enmax*, *supra* note 233 at paras 23, 27.

Further, the Court of Appeal held that despite Enmax Corporation having some rights against Calpine under its assignments for the credits, "it [did] not have a right to claim the credit directly from the AESO."[245]

4. COMMENTARY

The *Enmax* cases confirm that parties that disagree with a final and binding regulatory decision must appeal the decision, as they will be prevented from relitigating the same issue in a different forum. If a party attempts to disguise what should have been brought as an appeal as a fresh proceeding, they will be barred from doing so as it will trigger the doctrine of res judicata.

## VII. INSOLVENCY

### A. *ALPHABOW ENERGY LTD. (RE)*

1. BACKGROUND

*Alphabow Energy Ltd (Re)*[246] is a decision regarding the distinction between whether a Gross Overriding Royalty (GOR) is a security interest or interest in land, and how such clauses are treated in the insolvency context.

2. FACTS

AlphaBow Energy Ltd. (AlphaBow) was a privately owned oil and gas development and production company. It operated several thousand pipelines and wells, and hundreds of facilities across Alberta.[247]

In March 2024, AlphaBow filed a Notice of Intention (NOI) to make a proposal under the *Bankruptcy and Insolvency Act*[248] and later converted this to proceedings under the *Companies' Creditors Arrangement Act*.[249] In November 2024, AlphaBow applied for a sales approval and vesting order for a proposed sales transaction with Resistance Energy Ltd.[250] The sales approval and vesting order application was adjourned pending the resolution of AlphaBow's application for a declaration that specific Royalty Agreements between AlphaBow and Advance Drilling Ltd. (Advance) did not create an interest in land and could be vested off to facilitate AlphaBow's sale of assets.[251] In November 2018, AlphaBow and Advance entered into a Master Drilling and Completion Contract (MDCC) governing the execution of a multi-year drilling and completion plan.[252] Within this agreement, AlphaBow

245 *Ibid* at para 31.
246 2024 ABKB 652 [*Alphabow*].
247 *Ibid* at para 1.
248 RSC 1985, c B-3 [*BIA*].
249 RSC 1985, c C-36; *Alphabow*, *supra* note 246 at paras 2–3.
250 *Alphabow*, *supra* note 246 at para 7.
251 *Ibid* at para 7.
252 *Ibid* at para 10.

and Advance entered into a GOR agreement (the 2018 GOR), the stated purpose of which was to "'better secure the payment' of costs incurred by Advance pursuant to the MDCC."[253]

After several payment defaults by AlphaBow — breaching the MDCC — Advance invoked payment through the 2018 GOR.[254] AlphaBow failed to pay its first payment.[255] In response, Advance demanded payment in full under the MDCC and the 2018 GOR.[256]

In June 2021, Advance initiated an action against AlphaBow.[257] In September 2021, AlphaBow applied for partial summary judgment, which resulted in a Consent Judgment, a Royalty Agreement (the 2021 GOR), and a Settlement Agreement and Release (the Settlement Agreement).[258]

The 2021 GOR incorporates the CAPL Overriding Royalty Procedure, which states that the "the Overriding Royalty is an interest in land."[259]

The main issue for the Court of King's Bench of Alberta was whether the 2018 GOR and the 2021 GOR were interests in land.

### 3. DECISION

The Court applied the test from *Bank of Montreal v. Dynex Petroleum Ltd.*[260] (the *Dynex* Test), which held that a "royalty interest" or GOR can be an interest in land if:

1) the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the oil and gas substances recovered from the land; and

2) the interest, out of which the royalty is carved, is itself an interest in land.[261]

In applying the *Dynex* Test, the Court determined that despite there being an "intention-of-the-parties-to-create-an-interest-in-land clause," the 2018 GOR created a security interest and not an interest in land.[262] Similarly, the Court held that the 2021 GOR was not an interest in land,[263] and that the parties did not intend to create a true interest in land, but instead to "give [themselves] a backup collection tool if AlphaBow became insolvent."[264]

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[253] *Ibid* at para 11.
[254] *Ibid* at para 14.
[255] *Ibid*.
[256] *Ibid*.
[257] *Ibid* at para 16.
[258] *Ibid* at paras 17–18.
[259] *Ibid* at para 19.
[260] 2002 SCC 7 [*Dynex*].
[261] *Ibid* at para 22.
[262] *Alphabow*, *supra* note 246 at para 12, citing *Accel Canada Holdings Limited (Re)*, 2020 ABQB 182 [*Accel*].
[263] *Alphabow*, *supra* note 246 at para 24.
[264] *Ibid* at para 24.

The Court identified several contextual factors that made it skeptical of the parties' intent to create an interest in land. First, AlphaBow's debt to Advance continued to grow.[265] Second, there was a lack of clarity as to what consideration AlphaBow would receive for granting the 2021 GOR.[266] Third, the intention and purpose of the Settlement Agreement between the parties was vague.[267] Last, the parties' evidence provided limited assistance in identifying their intentions when they formed the 2021 GOR.[268]

The Court also found Advance's evidence to be self-serving.[269] Advance's materials highlighted that it wanted a "backup plan" in order to recover its debts from AlphaBow in the event that it became insolvent.[270] Further, Advance relied on the CAPL standard form agreement and believed it was sufficient to create an interest in land.[271] However, the Court determined that if the creation of an interest in land was as important to Advance as it purported, it would have been expressed in the parties' correspondence with one another, which did not occur.[272]

In terms of AlphaBow's evidence, while the Court held that it was also largely self-serving and unhelpful, it assisted the Court in confirming the surrounding circumstances demonstrating a lack of clarity with the 2021 GOR.[273]

The Court found that the 2021 GOR was nothing more than an attempt to improve Advance's debt status, while causing detriment to others.[274] Granting the 2021 GOR would make very little commercial sense because it would inevitably result in AlphaBow becoming insolvent.[275] For these reasons, the Court determined that the parties did not intend to create an interest in land in the 2021 GOR.

### 4. COMMENTARY

This case illustrates that, notwithstanding parties' apparent intention to create an interest in land, if the purpose of a clause is to secure payment for indebtedness, courts will interpret such clauses to be *de facto* security interests, and as such, they may be vested off in insolvency transactions. Energy companies should be cautious when drafting royalty agreements and should expect that such clauses may be interpreted as security interests rather than interests in land.

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265 *Ibid* at paras 13–15.
266 *Ibid* at para 19.
267 *Ibid* at para 20.
268 *Ibid* at paras 20–22.
269 *Ibid* at para 23.
270 *Ibid*.
271 *Ibid*.
272 *Ibid* at para 24.
273 *Ibid* at paras 20–21.
274 *Ibid* at para 28.
275 *Ibid* at para 25.

## B. *INVICO DIVERSIFIED INCOME LIMITED PARTNERSHIP V. NEWGRANGE ENERGY INC.*

### 1. BACKGROUND

In *Invico v Diversified Income Limited Partnership v. Newgrange Energy Inc.*,[276] Invico Diversified Income Limited Partnership (Invico) applied to the Court of King's Bench of Alberta to approve a Reverse Vesting Order (RVO) authorizing it to purchase the business and property of its debtor, Free Rein Resources Ltd. (Free Rein). The Court applied the *Dynex* Test to determine whether a GOR was an interest in land, and therefore, able to be vested out of Free Rein's estate pursuant to an RVO.

### 2. FACTS

NewGrange Energy Inc. (NewGrange) purchased oil and gas assets (the Asset) out of the receivership of another company.[277]

NewGrange attempted to sell the Asset for $2 million plus a 5 percent GOR but was unable to find buyers at the asking price. The owner of NewGrange chose to raise money to produce oil and gas himself and purchased the majority of the shares of Free Rein, which was in the midst of proceedings under the *Companies' Creditors Arrangement Act*. Free Rein had regulatory licences that made it easier to find viable investors.[278] Free Rein then purchased the Asset (Asset Purchase Agreement) from NewGrange for $750,000 cash, plus a 5 percent GOR granted back to NewGrange.[279] The Asset Purchase Agreement was signed on 30 November 2018.

In March 2023, Free Rein granted another GOR (the Shareholder Royalty Agreement) to Free Rein Shareholders (the Shareholders) who collectively provided $150,000 to Free Rein to recomplete a well.[280]

On 21 September 2022, through a loan agreement, Invico advanced funds to Free Rein, which "defaulted on those loan obligations shortly thereafter."[281] On 12 June 2023, Free Rein filed an NOI to make a proposal under the *BIA*. A sale and investment solicitation process (SISP) was approved on 25 August 2023, which led to two [third party] bids, along with Invico's "stalking horse bid" (an initial bid on a bankrupt's assets from an interested buyer chosen by the bankrupt company).[282]

Before the SISP could conclude, Tidewater Midstream and Infrastructure Ltd. (Tidewater), the operator of the gas plant responsible for processing Free Rein's gas, terminated its contracts with Free Rein, claiming force majeure.[283] No other gas processing

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276 2024 ABKB 214 [*Invico*].
277 *Ibid* at para 6.
278 *Ibid* at para 7.
279 *Ibid*.
280 *Ibid* at para 8.
281 *Ibid* at para 9.
282 *Ibid*.
283 *Ibid* at para 10.

option was feasible for this Asset, resulting in the gas wells being shut in.[284] The shut in of Free Rein's gas wells was a material adverse change, causing the prospective purchasers to withdraw their bids.[285] As described by the Court, the *BIA* proceeding was "converted into a proceeding under the [*Companies' Creditors Arrangement Act*] and FTI Consulting Canada Inc. (FTI) was appointed as [m]onitor."[286]

Invico proposed an RVO structure whereby it would acquire 100 percent of Free Rein's shares by way of credit bid in exchange for the forgiveness of $6.5 million debt Free Rein owed to Invico.[287] Invico would also "assume certain liabilities attached to the assets being transferred and make a cash payment of approximately $650,000 for court-ordered charges and statutory priorities."[288]

NewGrange and the Shareholders argued that the language of their Royalty Agreements made it clear that the parties intended to, and did, convey an interest in the land; therefore, the Court's ability to vest the GOR out was restricted.[289]

Invico argued that, looking at the Royalty Agreements themselves and the circumstances of the transaction, the GORs were not treated as interests in land.[290]

### 3. DECISION

The Court applied the factors discussed in *Harte Gold Corp. (Re)*[291] and found that it was appropriate to utilize an RVO structure.[292]

The primary dispute in *Invico* was whether the NewGrange and Shareholder GORs were interests in land which "run with the land."[293] The Court noted that there were two ways in which Invico could establish its entitlement to vest out the GORs: (1) by proving the GORs were not an interest in land, or (2) by proving that, even if the GORs were an interest in land, it was equitable and appropriate to vest them out.[294]

The Court applied the *Dynex* Test[295] to determine whether the GORs were interests in land.[296] Taking the whole contract and surrounding circumstances into consideration, the Court found that NewGrange is GOR was not an interest in land[297] and found that the assignment clause in the Shareholder Royalty Agreement was "fundamentally inconsistent"

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284 *Ibid*.
285 *Ibid*.
286 *Ibid*.
287 *Ibid* at para 11.
288 *Ibid*.
289 *Ibid* at para 32.
290 *Ibid*.
291 2022 ONSC 653 at para 20 [*Harte Gold Corp*].
292 *Invico*, *supra* note 276 at para 29.
293 *Ibid* at para 30.
294 *Ibid* at para 31. For a recent discussion on characterizing GORs as legal versus equitable interests in land, see *PrairieSky Royalty Ltd v Yangarra Resources Ltd*, 2025 ABCA 240.
295 See the discussion of *Alphabow*, *supra* note 246 for the *Dynex* Test.
296 *Invico*, *supra* note 276 at para 35; *Dynex*, *supra* note 260 at paras 21–22.
297 *Invico*, *supra* note 276 at para 106.

with the language purporting to create an interest in land.[298] Thus, it failed the first arm of the *Dynex* Test of being "sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land."[299] The Court also found that the second arm of the *Dynex* Test was not satisfied, as Free Rein gained title to the relevant leasehold interests on 30 November 2018, when the Asset Purchase Agreement closed.[300] Therefore, as of 30 October 2018, Free Rein had no interest to grant to another party.[301]

Likewise, the Court found that the Shareholders' GOR was not an interest in land.[302] The application of the first arm of the *Dynex* Test found the language in Clause 2 of the Royalty Agreement to indicate that the Shareholders' interest is not in land, but rather, in substances produced from a specific well.[303] Clause 6 of the Royalty Agreement indicated that, "in the event of a corporate sale of Free Rein, the overriding royalty would terminate," suggesting that the Shareholders held an interest in the operator rather than the land.[304] Unless a party is able to prove both arms of the *Dynex* Test, it will fail entirely. In this case, failure of the first arm resulted in the test not being satisfied, and as such, the Shareholders' GOR was not an interest in land.[305]

Given that the Court did not find there to be an interest in land in this case, it did not analyze the scope of its discretion to vest out an interest in land.[306]

### 4. COMMENTARY

The key takeaway from *Invico* comes down to the nature of the royalty in question and the intention of the parties when creating GORs. It is a heavily contextual analysis that requires clarity of each party's intentions — not inferences or assumptions. Thus, it is of the utmost importance for parties who intend to have their royalties constitute an interest in land to ensure the language used is consistent throughout all supplementary agreements related to the transaction in order to properly describe the interests that would run with the land. This will help avoid the risk of the royalties being presumed to be a mere contractual right or security interest.

NewGrange has received leave to appeal,[307] but the Court of Appeal of Alberta has not yet rendered its decision.

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298 *Ibid* at para 89.
299 *Dynex*, *supra* note 260 at para 22; *Invico*, *supra* note 276 at para 89.
300 *Invico*, *supra* note 276 at para 106.
301 *Ibid* at para 106.
302 *Ibid* at para 114.
303 *Ibid* at para 110.
304 *Ibid* at para 112.
305 *Ibid* at para 94.
306 *Ibid* at para 116.
307 *NewGrange Energy Inc v Invico Diversified Income Limited Partnership*, 2024 ABCA 244.

## C. *QUALEX-LANDMARK TOWERS INC. V. 12-10 CAPITAL CORP.*

### 1. BACKGROUND

*Qualex-Landmark Towers Inc. v. 12-10 Capital Corp.*[308] concerned an appeal in respect of a lower court decision that (1) allowed Qualex-Landmark Towers Inc. (Qualex) to amend its Statement of Claim to add as defendants mortgagees of the Lands (defined below),[309] and (2) granted an attachment order over any proceeds of sale of the Lands.[310]

### 2. FACTS

Qualex brought a claim that alleged chemical contaminants had migrated to its land from adjoining lands (the Lands) owned by 12-10 Capital Corp. (Capital). Qualex argued that Capital and any tenants controlling the Lands were liable in nuisance and negligence for the resulting damages.[311]

In January 2022, Capital agreed to sell the eastern portion of its Lands to an arm's-length purchaser.[312]

In response, Qualex sought to amend its Statement of Claim to include the mortgagees of the Lands as defendants to the claim. Qualex also sought an attachment order for any proceeds from the sale of the Lands,[313] and a declaration that any judgment should be paid from such proceeds in priority to "all creditors, debts, or obligations, including without limitation, secured creditors and registered mortgagees."[314] Qualex relied on *Redwater* to support its claim for priority over registered creditors in respect of the Lands.[315] In support of its position, Qualex argued that Capital had a "public duty under the *EPEA* to address the damage caused by the migration of contaminants from its lands."[316]

### 3. DECISION

The Court of Appeal held that the priority declaration sought by Qualex (and granted in the lower court *Qualex* decision) was unsupported by any statutory or existing court authority.[317] Further, the Court of Appeal held that "[t]he priority declaration Qualex seeks exceeds the limits on the power of the judiciary to change the law."[318]

The Court of Appeal held that the lower court's decision "[disrupted] legislated priority schemes" by granting "'super priorities' to private litigants for environmental remediation claims" despite "no assurance that money recovered will be used other than to serve the

308 2024 ABCA 115 [*Qualex* ABCA].
309 *Qualex-Landmark Towers Inc v 12-10 Capital Corp*, 2023 ABKB 109 at para 50 [*Qualex* ABKB].
310 *Ibid* at para 156.
311 *Qualex* ABCA, *supra* note 308 at para 2.
312 *Ibid* at para 3.
313 *Ibid* at para 6.
314 *Ibid*.
315 *Ibid* at para 8; *Redwater*, *supra* note 215.
316 *Qualex*, *supra* note 309 at para 13.
317 *Ibid* at para 18.
318 *Ibid* at para 20.

litigant's interests."[319] The appeal decision noted that, "if a change in law regarding priority entitlements is required to achieve environmental policy objectives … that change must be addressed by the Legislature." Until such a change occurs, a super priority claim of this nature cannot succeed in the courts.[320]

The Court of Appeal also determined that the application of the test from *Newfoundland and Labrador v. AbitibiBowater Inc.*[321] used in *Redwater* to determine whether a claim is provable in bankruptcy would not assist Qualex as a private litigant.[322] As such, the appeal was allowed.

### 4. COMMENTARY

This decision provides important guard rails and limitations on the scope of *Redwater*. Specifically, *Qualex* denies common law "super priorities" with respect to environmental obligations in favour of private litigants. This decision also includes commentary confirming that the role of the judiciary is to interpret and apply statutory entitlements to priority, not to create common law entitlements.

## D. *BLADE ENERGY SERVICES CORP. (RE)*

### 1. BACKGROUND

In *Blade Energy Services Corp. (Re)*,[323] the Court of King's Bench of Alberta considered whether an ongoing disconnection (or lock-out) of a producer by a gas plant operator is a continuing debt-collection remedy that would be subject to a stay under section 69(1)(a) of the *BIA*.[324]

### 2. FACTS

Conifer Energy Inc. (Conifer) and Razor Energy Corp. (Razor) are both producers of natural gas processed at a plant operated by Conifer.[325] Conifer claimed that Razor owed it approximately $8 million in arrears. Razor disputed that figure.[326]

After attempting to negotiate the clearance of the payments in arrears, Conifer warned Razor that it intended to disconnect Razor from the gas-gathering system connected to the plant if Razor did not pay its arrears or provide a satisfactory payment arrangement, as per the operating procedure agreement.[327] No agreement was reached between the parties, and

319 *Ibid* at para 26.
320 *Ibid*.
321 2012 SCC 67 at para 26 [*Abitibi*].
322 *Qualex*, *supra* note 308 at para 24.
323 2024 ABKB 100 [*Blade Energy*].
324 *Supra* note 248.
325 *Blade Energy*, *supra* note 323 at para 5.
326 *Ibid* at para 6.
327 *Ibid* at para 7.

Conifer disconnected Razor from the system.[328] Razor filed a NOI to file a proposal under the *BIA*.[329]

Conifer argued that the lock-out step was taken and completed before the NOI was filed, and therefore, was beyond the reach of the NOI-triggered stay.[330] However, the Court disagreed with this characterization and found that the lock-out was an ongoing/continuing remedy.[331] Justice Lema found that Razor's decision to file an NOI triggered a stay of proceedings under section 69(1)(a) of the *BIA*, and Conifer's continuing actions to lock-out Razor from the plant were in breach of the stay.[332]

### 3. DECISION

The Court determined that, while the terms "remedy" and "other proceedings" in section 69(1)(a) of the *BIA* should be interpreted broadly, the goal of the *BIA* to provide "breathing room" to a debtor should also be considered.[333]

The Court agreed with Conifer that the lock-out began before the NOI was filed.[334] It noted that section 69(1)(a) of the *BIA* does not take effect retroactively, nor can it undo completed steps.[335] However, this section captures the commencement and continuation of proceedings to recover provable claims.[336]

The Court assessed the lock-out steps Conifer took and determined that the lock-out was a continuing, rather than completed, remedy due to its reversible nature and the fact that it provided "ongoing leverage" in the recouping of arrear payments.[337] Section 69(1)(a) of the *BIA* was found to "[shut] down in-progress collection actions" and did not preserve a "continuing action status quo."[338] Therefore, the Court found that section 69(1)(a) of the *BIA* applied, and the lock-out was stayed when the NOI was filed.[339] Conifer's continuation of the lock-out following Razor's filing of the NOI was found to be a breach of the stay[340] and Conifer was directed to discontinue the lock-out.[341]

### 4. COMMENTARY

*Blade Energy* determined that the ongoing disconnection or "lock-out" of a gas producer from a gas plant by the plant operator is a continuing remedy, and thus, should be stayed

328 *Ibid* at para 8.
329 *BIA*, *supra* note 248, s 69(1)(a).
330 *Blade Energy*, *supra* note 323 at para 28.
331 *Ibid* at para 33.
332 *Ibid* at paras 38, 67.
333 *Ibid* at paras 14–15, 22.
334 *Ibid* at para 29.
335 *Ibid* at para 30.
336 *Ibid* at paras 31–38.
337 *Ibid* at paras 33–38.
338 *Ibid* at para 48.
339 *Ibid* at para 67.
340 *Ibid* at paras 66–68.
341 *Ibid* at para 77.

during proceedings under the *BIA*. While the decision was appealed, the Court of Appeal of Alberta declined to hear the appeal due to mootness.[342]

## E. *AQUINO V. BONDFIELD CONSTRUCTION CO.*

### 1. BACKGROUND

In *Aquino v. Bondfield Construction Co.*,[343] the Supreme Court of Canada clarified the application of the common law corporate attribution doctrine originally created in *Canadian Dredge & Dock Co. v. The Queen*.[344] The common law doctrine of corporate attribution provides guiding principles for when the actions, knowledge, state of mind, or intent of the directing mind of a corporation may be attributed or imputed to the corporation.[345]

### 2. FACTS

Mr. Aquino was the directing mind of two construction companies.[346] Restructuring and bankruptcy proceedings began when the companies were dealing with significant financial difficulties. Through investigations, the appointed monitor and trustee in bankruptcy discovered that Mr. Aquino and the other appellants had been stealing millions of dollars from the construction companies through a false invoicing scheme.[347] The trustee and monitor applied to the Ontario Superior Court of Justice to challenge the false invoice transactions as "transfers at undervalue" under section 96(1)(b)(ii)(B) of the *BIA*.[348] The application judge and the Ontario Court of Appeal held that the false invoice payments were "transfers at undervalue," meaning that the debtor had transferred property or provided services to someone for little to no consideration.[349] In their analysis, both levels of court applied the doctrine of corporate attribution to attribute Mr. Aquino's fraudulent intent to the debtor companies and ordered the appellants to pay the trustee and monitor the money received under the fraudulent scheme.[350]

### 3. DECISION

The Supreme Court of Canada found that the lower courts correctly applied a "badges of fraud" approach when assessing the appellants as per section 96(1)(b)(ii)(B) of the *BIA*.[351] Section 96(1)(b)(ii)(B) is disjunctive in that it must be proven "that the debtor was insolvent at the time of the transfer *or* that the debtor intended to defraud, defeat, or delay a creditor."[352] The debtor need not be insolvent at the time of transfer for the Court to find that the requisite intent to defraud, defeat, or delay creditors.[353]

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342 2025 ABCA 14.
343 2024 SCC 31 [*Aquino*].
344 1985 CanLII 32 (SCC) [*Dredge*].
345 *Aquino*, *supra* note 343 at para 1.
346 *Ibid* at para 2.
347 *Ibid*.
348 *Ibid*; *BIA*, *supra* note 248.
349 *Aquino*, *supra* note 343 at paras 3–4.
350 *Ibid* at para 4.
351 *Ibid* at para 50; *BIA*, *supra* note 248, s 96(1)(b)(ii)(B).
352 *Aquino*, *supra* note 343 at paras 40, 50 [emphasis added].
353 *Ibid* at para 51.

Turning to the discussion of the corporate attribution doctrine and its applicability in this case, the Supreme Court of Canada clarified that common law corporate attribution (also known as the identification doctrine) should not be applied mechanically in every case, but rather ought to be applied purposively, contextually, and in a pragmatic manner.[354]

The decision also discussed two exceptions to the corporate attribution doctrine originating in *Dredge*: the fraud and no benefit exceptions, and the appropriate way to apply them with consideration to public policy.[355] The appellant claimed that there could be no attribution in this case because Mr. Aquino acted fraudulently, and his actions did not benefit the companies. The Supreme Court of Canada rejected this submission on the basis that it amounted to saying that the common law doctrine of corporate attribution allows "a fraudulent directing mind and his accomplices to avoid liability *because* they defrauded the company they ran."[356]

By relying on *Deloitte & Touche v. Livent Inc. (Receiver of)*,[357] the Supreme Court of Canada indicated that applying the exceptions in this case would deny third party creditors the benefit of a statutory remedy intended to protect them, ultimately undermining the purpose of section 96 of the *BIA*.[358] The application judge's decision was upheld, attributing Aquino's fraudulent intent to the construction companies.[359]

### 4. COMMENTARY

The Supreme Court of Canada's decision provides clarity regarding the application of the doctrine of corporate attribution in an insolvency context. The guiding principles for the common law doctrine of corporate attribution provide that generally, a person's fraudulent acts may be attributed to a corporation if two conditions are met: (1) the wrongdoer was the directing mind of the corporation at the relevant times, and (2) the wrongful actions of the directing mind were performed within the sector of corporate responsibility assigned to them. The decision also highlights that a purposeful, contextual, and pragmatic approach is required and that there is no one-size-fits-all approach in applying the doctrine.

## F. *POONIAN V. BRITISH COLUMBIA (SECURITIES COMMISSION)*

### 1. BACKGROUND

In *Poonian v. British Columbia*,[360] the Supreme Court of Canada considered whether fines or penalties imposed by regulatory bodies (such as the Securities Commission, defined below) can be discharged by a bankruptcy filing. The Court also further clarified the application of sections 178(1)(a) and (e) of the *BIA*.

354 *Ibid* at para 74.
355 *Ibid* at para 90; *Dredge*, *supra* note 344 at 681–82, 712–13.
356 *Aquino*, *supra* note 343 at para 6 [emphasis in original].
357 2017 SCC 63.
358 *Aquino*, *supra* note 343 at paras 87–88.
359 *Ibid* at para 99.
360 2024 SCC 28 [*Poonian*].

### 2. FACTS

Mr. and Ms. Poonian (collectively the Poonians), along with family and friends, participated in market manipulation contrary to section 57(a) of the *Securities Act*[361] by way of manipulating the share price of a publicly traded company that they controlled.[362]

The British Columbia Securities Commission (Securities Commission) ordered the payment of administrative penalties and issued disgorgement orders for both individuals.[363] In 2018, the Poonians made a voluntary assignment in bankruptcy, and two years later, applied for discharge from bankruptcy.[364] The Securities Commission, the Poonians' largest creditor, opposed this application.[365] It applied to the British Columbia Supreme Court for a declaration that the debts in "the administrative penalties and disgorgement orders not be released by any order of discharge."[366] It argued that the exemptions in subsections 178(1)(a), (d), and (e) of the *BIA* applied, which the British Columbia Supreme Court accepted.[367]

The Poonians appealed to the British Columbia Court of Appeal, challenging the lower court's interpretation of the *BIA* and argued that the Court had erred in adopting the rationale in *Alberta Securities Commission v. Hennig*.[368] The Court of Appeal found that although section 178(1)(a) was applied in error, the lower court correctly identified that section 178(1)(e) applied to both the administrative penalties and the disgorgement orders.[369] The Court of Appeal also rejected the narrow approach adopted by the Court of Appeal of Alberta in *Hennig*.[370] The Poonians appealed to the Supreme Court of Canada.

### 3. DECISION

The Supreme Court of Canada allowed the appeal in part and reaffirmed the general rule in the *BIA* that a discharge releases the bankrupt of all claims. However, the Supreme Court of Canada noted that this rule is limited by section 178(2) and several exceptions listed in sections 178(1)(a) through (h) of the *BIA*.[371]

The Supreme Court of Canada upheld the Court of Appeal's holding that the administrative penalties and disgorgement orders were not captured by the exception to a discharge order in section 178(1)(a) of the *BIA*.[372] The Supreme Court of Canada confirmed that this exception, while not limited to orders imposed in a criminal or quasi-criminal context, requires that the debt must be imposed by a court, not a tribunal or regulatory agency.[373]

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361 RSBC 1996, c 418.
362 *Poonian*, *supra* note 360 at para 7.
363 *Ibid* at para 9.
364 *Ibid* at para 10.
365 *Ibid*.
366 *Ibid* at para 11.
367 *Ibid* at paras 11, 14.
368 2020 ABQB 48 [*Hennig*], rev'd 2021 ABCA 411; *Poonian*, *supra* note 360 at para 15.
369 *Poonian*, *supra* note 360 at paras 16–17.
370 *Ibid* at para 19.
371 *Ibid* at paras 25–26; *BIA*, *supra* note 248, ss 178(1)(a)–(h).
372 *Poonian*, *supra* note 360 at para 51.
373 *Ibid* at paras 42, 50.

In making its decision, the Supreme Court of Canada clarified that, for the exception in section 178(1)(e) of the *BIA* to apply, there must be a "direct [causal] link" between the bankrupt's fraudulent misrepresentation and the penalties applied to them.[374] In this case, the administrative penalties were not found to be directly caused by the Poonians' fraudulent misrepresentation, but rather, by the Securities Commission's decision to sanction the Poonians. However, the Supreme Court of Canada held that the disgorgement orders were captured by the exception because the value of the orders equalled the amount the Poonians had received from their fraudulent activity. This established a direct link between the Poonians' fraudulent misrepresentations and the monetary order.[375]

The Supreme Court of Canada's decision departed from the Court of Appeal of Alberta's decision in *Hennig*, clarifying that any creditor may rely on the exceptions set out in section 178(1) of the *BIA*.[376] The creditor relying on the exceptions need not be a direct victim of the bankrupt.[377] This allowed the Securities Commission (a creditor, but not a victim of the bankrupts' fraudulent scheme) to seek to have the exceptions applied to an order of discharge.

#### 4. COMMENTARY

The Supreme Court of Canada's decision in *Poonian* will have significant implications on regulatory enforcement. This case drew a notable distinction between disgorgement orders and administrative penalties, with only disgorgement orders being exempt from discharge under section 178(1)(e) of the *BIA*.

*Poonian* also clarifies the Supreme Court of Canada's stance on conflicting jurisprudence coming out of British Columbia and Alberta on this topic. *Poonian* serves as a departure from *Hennig*, thereby rejecting the "direct victim" requirement, and providing clear guidelines on how to interpret the provision requiring a link between fraud and the relevant debt.

## VIII. ARBITRATION

### A. *AROMA FRANCHISE COMPANY INC. V. AROMA ESPRESSO BAR CANADA INC.*

#### 1. BACKGROUND

While not involving an energy corporation or energy law, *Aroma Franchise Company Inc. v. Aroma Espresso Bar Canada Inc.*[378] was the leading arbitration decision in 2024 and provided significant insight into the standard of an arbitrator's requirements for disclosure, reasonable apprehension of bias, and disqualification on these grounds. This decision is of interest in the energy context as it provides valuable insight for clients, in-house counsel, and external counsel to consider when communicating with and appointing an arbitrator.

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374 *Ibid* at para 76; *BIA*, *supra* note 248, s 178(1)(e).
375 *Poonian*, *supra* note 360 at para 113.
376 *Ibid* at para 84.
377 *Ibid* at para 86.
378 2024 ONCA 839 [*Aroma*], leave to appeal to SCC refused, 2025 CanLII 71462 (SCC).

### 2. FACTS

The parties were involved in a lengthy international commercial arbitration (the MFA Arbitration) regarding a Master Franchise Agreement (MFA) between Aroma Franchise Company Inc. (Aroma Franchise) and Aroma Espresso Bar Canada (Aroma Espresso).[379] A provision in the MFA stated that the parties "shall jointly select one (1) neutral arbitrator" who must have "no prior social, business or professional relationship with either party."[380] 17 months after the MFA Arbitration had commenced and 15 months before the arbitral award was released, the lead lawyer for Aroma Espresso asked the arbitrator if he would serve as an arbitrator for another unrelated arbitration.[381] The arbitrator accepted the appointment but failed to disclose such acceptance to Aroma Franchise.[382] Aroma Franchise only became aware of the arbitrator's involvement in the unrelated arbitration following his final award.[383] As a result, Aroma Franchise applied to the Ontario courts to set aside the final award.[384]

The application judge granted the application and set aside the arbitral award on the basis that the arbitrator was required to disclose his engagement, and his lack of disclosure gave rise to a reasonable apprehension of bias.[385] She cited article 12 of the UNCITRAL Model Law on International Commercial Arbitration (the Model Law),[386] which states that an arbitrator is to disclose, prior to appointment, "any circumstances likely to give rise to justifiable doubts as to his impartiality or independence."[387] She also referred to the International Bar Association Guidelines,[388] which establish a non-exhaustive stoplight system of "red," "orange," or "green" situations where an arbitrator may or may not act.[389] Her decision relied extensively on correspondence exchanged between counsel prior to the arbitrator being appointed that explained each counsel's relationships with potential arbitrators — such correspondence was never provided to the arbitrator.[390]

The application judge also noted that although the arbitrator's involvement in the unrelated arbitration did not in and of itself lead to a reasonable apprehension of bias, in this situation, it "fatally undermine[d] the [respondents'] confidence in the entire process of the [MFA] Arbitration."[391]

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379 *Ibid* at para 5.
380 *Ibid* at para 20.
381 *Ibid* at para 6.
382 *Ibid* at para 7.
383 *Ibid* at para 8.
384 *Ibid*.
385 *Ibid* at para 9.
386 UNCITRAL Model Law on International Commercial Arbitration, art 12, Schedule 2 to the *International Commercial Arbitration Act*, 2017, SO 2017, c 2, Sch 5 [Model Law].
387 *Aroma*, *supra* note 378 at para 50.
388 International Bar Association, "IBA Guidelines on Conflicts of Interest in International Arbitration" (25 May 2024), online: [perma.cc/FPA2-SMCA] [IBA Guidelines].
389 *Aroma*, *supra* note 378 at para 52.
390 *Ibid* at para 9.
391 *Ibid* at para 58, quoting the application judge.

3. DECISION

The Ontario Court of Appeal overturned the lower court's ruling and upheld the arbitral award, emphasizing the objective nature of the tests to give rise to a duty to disclose and a reasonable apprehension of bias.

The Court of Appeal began its analysis by considering the legal duty of disclosure. The Court held that disclosure is important because it can help arbitrators avoid the appearance of bias and enable the parties to determine whether they want to proceed with the specific arbitrator.[392] As per article 12(1) of the Model Law,[393] arbitrators have a duty to disclose when there may be circumstances that could give rise to justifiable doubts about their impartiality.[394] These circumstances are to be assessed from the "standpoint of a fair-minded and informed observer."[395]

In analyzing the application judge's decision, the Court noted that the MFA did not directly mandate disclosure.[396] The Court found that the application judge had erred in law by resting her finding of the duty to disclose primarily on the IBA Guidelines and the parties' correspondence.[397] The Court determined that the application judge failed to apply the objective test from the Model Law of "what a fair-minded and objective person would consider as likely to give rise to justifiable doubts about the Arbitrator's impartiality or independence."[398]

In making its finding, the Court of Appeal held that the arbitrator was not privy to counsel's discussions between each other.[399] As stated by the Court, "[h]ow can there be any real danger of bias, or any reasonable apprehension or likelihood of bias, if the judge does not know of the facts that … are relied on as giving rise to the conflict of interest?"[400] The Court also found that while the IBA Guidelines suggest that arbitrators may have a duty to inquire to ensure that there is no reasonable apprehension of bias, this is not a legal standard, nor one which the arbitrator had failed to meet, if he did have this duty.[401]

The Court applied the objective test for disclosure and determined that an arbitrator is not automatically required to disclose their involvement in two arbitrations with lawyers from the same firm.[402] Even if the IBA Guidelines were considered, this situation did not fall within the "orange" category requiring disclosure because it was a single appointment for an unrelated dispute.[403] The Court considered Aroma Franchise's claims that Aroma Espresso's counsel would be advantaged by having more time in front of the arbitrator and that the

392 *Ibid* at paras 70–71.
393 Model Law, *supra* note 386, art 12(1).
394 *Aroma*, *supra* note 378 at para 72.
395 *Ibid* at para 73.
396 *Ibid* at para 82.
397 *Ibid* at para 83.
398 *Ibid* at para 84.
399 *Ibid* at para 90.
400 *Ibid* at para 89.
401 *Ibid* at para 95.
402 *Ibid* at para 96.
403 *Ibid* at para 107.

arbitrator would be biased by its income-producing relationship with Aroma Espresso.[404] Ultimately, the Court found that both concerns were unwarranted. The related appearances only established familiarity, which does not result in automatic bias.[405] The second arbitration was completely unrelated to the MFA Arbitration, and it is common knowledge that arbitrators are paid by the parties to an arbitration.[406]

The Court allowed the appeal and found that by using the objective test, a fair-minded and reasonable observer would not conclude that there was a reasonable apprehension of bias.

### 4. COMMENTARY

*Aroma* provides helpful guidance to practitioners, arbitrators, and the industry concerning the test for reasonable apprehension of bias, and confirms that the standards are objective and will not be easily met. Energy companies engaged in arbitration and concerned about potential biases should be aware that there are only certain situations that arbitrators are required to disclose. The mere involvement of an arbitrator in two unrelated matters with the same counsel, for which they are being compensated, is insufficient. Any concerns about bias or the involvement of the arbitrator in multiple proceedings should be raised early on and disclosed to all parties prior to engaging the arbitrator. If the concern of potential bias is significant, parties may also choose to incorporate stricter standards for disclosing potential conflicts, such as those identified in the IBA Guidelines.[407]

The recent case of *Vento Motorcycles, Inc. v. Mexico*[408] supplements the decision of *Aroma*. The primary differences, among others, in *Vento Motorcycles* were that the arbitration panel involved three individuals, and Mexico's appointed arbitrator was communicating with its lead counsel concerning future opportunities and career advancement.[409] In this decision, the Ontario Court of Appeal agreed with the lower court, and found that there was a reasonable apprehension of bias in respect of which disclosure was necessary because Mexico's appointed arbitrator had communicated with Mexican officials during the arbitration process and had opportunities for career advancement.[410] The Court found that, in this case, the arbitrator's involvement in the three-person panel tainted the entire panel and completely eroded the legitimacy of the process.[411] Therefore, the Court set aside the tribunal's award.

Reading *Aroma* and *Vento Motorcycles* together, it is clear that while appointing an arbitrator to multiple hearings alone is insufficient to raise a reasonable apprehension of bias, parties should be cautious to limit their interactions with arbitrators and should avoid providing arbitrators with additional benefits beyond payment of fees. Further, discussions should be held in advance with counsel and previous involvement with arbitrators, if any, should be disclosed to avoid a potential apprehension of bias. If a party has concerns about

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404 *Ibid* at para 112.
405 *Ibid* at para 113.
406 *Ibid* at paras 114–15, 117–18.
407 IBA Guidelines, *supra* note 388.
408 2025 ONCA 82 [*Vento Motorcycles*], leave to appeal to SCC refused, 2025 CanLII 94231 (SCC).
409 *Ibid* at para 3.
410 *Ibid* at paras 13, 66.
411 *Ibid* at paras 42, 46, 48.

an arbitrator's possible bias, they should raise these concerns early to avoid prolonging the process and increasing expenses.

## B. *INTER PIPELINE LTD. V. TEINE ENERGY LTD.*

### 1. BACKGROUND

In *Inter Pipeline Ltd. v. Teine Energy Ltd*,[412] the Court of King's Bench of Alberta confirmed that in Alberta, unlike some other jurisdictions, the appropriate test when determining a stay of enforcement of a domestic arbitral award pending appeal is the tripartite test used for other stay applications and injunctions.[413] This case clarified ongoing confusion about whether a party is required to prove "irreparable harm" in staying an arbitral award in Alberta. The Court also considered the applicability and impact of sealing orders when challenging an arbitral award.

### 2. FACTS

Inter Pipeline Ltd. (IPL) and Teine Energy Ltd. (Teine) were parties to a Pipeline Connection Agreement (PCA) that required the parties to arbitrate their disputes.[414] The parties disputed the terms of Teine's compensation for quality changes under the PCA.[415] The dispute was heard by a three-member arbitral panel under the ADR Institute of Canada (ADRIC) rules.

While the parties had mixed success in the arbitration, IPL applied to the Court for permission to appeal the award and set it aside, and also sought a sealing order to prevent the public from accessing the court file due to the confidentiality of the arbitration proceedings.[416] Teine brought a separate application to enforce the arbitral award.[417]

In seeking the stay, IPL relied on a recent line of Ontario authorities that modify the *RJR MacDonald Inc. v. Canada (Attorney General)* tripartite test for stays or injunctions for arbitral awards,[418] by not requiring the party seeking a stay to prove irreparable harm.[419]

As to the sealing order, IPL asserted that there were three public interest reasons for limiting the open courts principle, including: (1) the public interest generally, and in the midstream industry broadly, in confidentiality; (2) the preservation of private arbitration as a dispute resolution mechanism to safeguard judicial resources for other matters; and (3) the potential chilling effect on challenging arbitration awards for fear of allowing open access to a confidential arbitration record.[420] While Teine agreed that the arbitration record contained

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[412] 2024 ABKB 740 [*Inter Pipeline*].
[413] *Ibid* at para 17.
[414] *Ibid* at para 5.
[415] *Ibid* at para 1.
[416] *Ibid* at para 8.
[417] *Ibid*.
[418] 1994 CanLII 117 (SCC) [*RJR*]. The *RJR* three-part test for a stay or injunction asks: (1) Is there a serious issue to be determined; (2) Will the applicant suffer irreparable harm if the stay is refused; and (3) Does the balance of convenience favour the granting of the stay? (*ibid* at 348.)
[419] *Inter Pipeline*, *supra* note 412 at para 12.
[420] *Ibid* at paras 35–36.

confidential information, it argued that there were other mechanisms available to keep such information separate from the court record.[421]

### 3. DECISION

Justice Feasby rejected the Ontario approach of staying an enforcement of an arbitration award, finding it "not principled."[422] Justice Feasby confirmed that the test for granting a stay of enforcement of arbitral awards pending appeal in Alberta remains the *RJR* tripartite test (as is the case in British Columbia and Manitoba).[423] He considered the decision of the Court of King's Bench of Manitoba in *Shelter Canadian Properties Limited v. Christie Building Holding Company, Limited*[424] and, in noting how *The Arbitration Act* in Manitoba[425] has similar provisions to Alberta's *Arbitration Act*,[426] agreed with the Manitoba Court's decision that:

> [T]he exercise of the court's discretion [to stay enforcement of a domestic award] under s 49(5) of the [Manitoba] *Act* should be governed by the same principles and criteria which are to be applied when a party seeks a stay pending an appeal of a judgment.[427]

He also held that the Legislature's use of the word "stay" in section 49(5) of the Alberta *Arbitration Act*,[428] indicates that the usual tripartite test for stays applies in the same way that its use of the word "appeal" indicates that the usual appellate standard of review applies.[429]

Justice Feasby determined that IPL's appeal raised a serious issue to be tried,[430] but that IPL did not meet the burden of irreparable harm because IPL was a large company that could shoulder the burden of the award pending the appeal.[431] Further, Justice Feasby held that the parties were free to govern the rules of the arbitration process and could easily have included a provision that allowed for an automatic stay pending appeal.[432] There was "no equitable reason to relieve IPL from circumstances which could have been avoided."[433]

In terms of the sealing order, Justice Feasby reinforced that the open court principle is a "cornerstone of the common law"[434] and can only be limited to protect a public interest.[435] Justice Feasby dismissed IPL's claim that preventing disclosure of its own business information, which IPL argued was proprietary and akin to a trade secret, was something that

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[421] *Ibid* at para 58.
[422] *Ibid* at para 15.
[423] *Ibid* at paras 17–18.
[424] 2021 MBQB 59 [*Shelter Canadian*].
[425] CCSM c A120 [Manitoba's *Arbitration Act*].
[426] RSA 2000, c A-43 [*Arbitration Act*].
[427] *Inter Pipeline*, *supra* note 412 at para 18, citing *Shelter Canadian*, *supra* note 424 at para 28.
[428] *Arbitration Act*, *supra* note 426, s 49(5).
[429] *Inter Pipeline*, *supra* note 412 at para 19.
[430] *Ibid* at para 21.
[431] *Ibid* at paras 24–27.
[432] *Ibid* at para 28.
[433] *Ibid*.
[434] *Ibid* at para 31.
[435] *Ibid* at para 34.

engaged the public interest.[436] However, the Court found that there is a public interest in maintaining the confidentiality expectations of a third party, such as suppliers or shippers.[437]

He also dismissed IPL's claim that there is a public interest in encouraging private arbitration for the purpose of reserving scarce judicial resources, finding instead that there is a public interest in the Court maintaining a "healthy civil docket" to develop the common law and interpret legislation.[438]

Finally, Justice Feasby rejected the potential chilling effect on private arbitration and stated that while the parties chose private arbitration, their "clear expectation in making that choice" was that once an award was rendered, any enforcement or appeal proceedings would take place in court.[439] Ultimately, the Court held that the appropriate approach was to grant a sealing order that that would only protect any extricable confidential information.[440]

#### 4. COMMENTARY

*Inter Pipeline* serves as a reminder that the default position for enforcement of an arbitral award may depend on the juridical seat of the arbitration and governing law. In Alberta, the enforcement of an arbitral award is immediately enforceable unless the court grants a stay and, for the stay to be granted, the applicant must meet the *RJR* tripartite test, including irreparable harm. Had this application been considered in Ontario, where no irreparable harm is required, the stay may have been granted. As such, parties concerned about potential financial losses following a negative arbitral award may consider a provision in their arbitration agreement that allows for an automatic stay pending appeal.

In terms of sealing orders, this case reinforces that clients and counsel should turn their minds to the privacy of arbitration records if an arbitration ultimately requires court intervention. While privacy and confidentiality are keystones of arbitration, the courts are reluctant to maintain that privacy if it conflicts with the open court principle. When drafting arbitration agreements, including choosing the rules governing a potential arbitration, parties should be cognizant of the risks of disclosure and may consider drafting agreements that incorporate a private appeal mechanism, an automatic stay, or that otherwise avoid disclosure.

### C. *HUSKY OIL OPERATIONS LIMITED V. TECHNIP STONE & WEBSTER PROCESS TECHNOLOGY INC.*

#### 1. BACKGROUND

*Husky Oil Operations Limited v. Technip Stone & Webster Process Technology Inc.*[441] deals with the extent to which a party is bound by an arbitration provision in a contract it relies on for warranty claims, but to which it was not a party.[442] The Court of Appeal of

436 *Ibid* at para 37.
437 *Ibid* at para 41.
438 *Ibid* at para 50.
439 *Ibid* at para 56.
440 *Ibid* at para 59.
441 2024 ABCA 369 [*Husky*].
442 *Ibid* at para 3.

Alberta determined that if contracting parties intend to bind non-parties to arbitration, thereby preventing them from accessing the courts, the contracting parties must make such a requirement clear and explicit in the contract.[443]

## 2. FACTS

Husky Oil Operations Limited (Husky) contracted with Saipem Canada Inc. (Saipem) to be the engineering, procurement, and construction contractor for a steam-assisted gravity drainage oil sands project.[444] Saipem subsequently contracted with Technip Stone & Webster Process Technology, Inc. and Technip USA, Inc. (collectively, Technip), for the design, manufacture, fabrication, and delivery of steam generator modules for the project (the Contract).[445] Husky was not a party to the Contract. However, the Contract contained a clause requiring that all warranties given by Technip were extended to Husky. The Contract also contained a dispute resolution clause, PC 13, which stated:

> In the event of a dispute between the PARTIES as to the performance of the SUPPLY or the interpretation, application or administration of the PURCHASE ORDER DOCUMENTS, [Technip] shall perform the SUPPLY as directed by [Saipem]. All disputes between the PARTIES not resolved by the initial decision of [Saipem]'s Representative, and all disputes arising out of this PURCHASE ORDER and its performance shall be settled in accordance with this PC 13.
>
> …
>
> PC 13.8: All disputes arising out of or in connection with the present PURCHASE ORDER shall be finally settled under the Rules or Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.[446]

In October 2015, Husky became aware of alleged defects in the steam generator modules that it claimed were covered by the warranty provisions under the Contract.[447] In November 2015, Husky informed Technip that it was considering making warranty claims under the Contract and, in November 2017, Husky served Technip with an amended Statement of Claim.[448] In October 2020, Technip applied to dismiss or stay the action, arguing that the Contract required mandatory arbitration.[449] Technip submitted that: (1) Husky was not entitled to take the benefit of the Contract's warranty provision without taking the corresponding obligations and burdens, including mandatory arbitration; and (2) Husky was out of time to invoke arbitration.[450]

At first instance, the application judge held that Husky was not required to arbitrate the dispute because the Contract did not expressly require Husky, or any non-party, to pursue its warranty claims by arbitration and Husky was not a party to the Contract.[451] Technip then appealed to the chambers judge who found that Husky's right to enforce the warranties was

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443 *Ibid*.
444 *Ibid* at para 4.
445 *Ibid*.
446 *Ibid* at paras 6–7.
447 *Ibid* at para 8.
448 *Ibid* at paras 9–10.
449 *Ibid* at para 11.
450 *Ibid*.
451 *Ibid* at para 12.

qualified by the arbitration requirement, and Husky was subject to the mandatory arbitration clause in the Contract.[452] The chambers judge concluded that it was too late for Husky to seek arbitration and struck the warranty-based claims, allowing the appeal on the negligence-based claims to proceed.[453]

### 3. DECISION

Justices Antonia, Feehan, and Shaner on the Court of Appeal of Alberta overturned the Court of King's Bench decision and held that Husky, as a non-signatory to the Contract, could not be bound by the mandatory arbitration clause in the absence of clear and explicit language.[454]

In making its determination, the Court of Appeal reinforced that arbitration is distinct from court proceedings in that it requires the parties to consent to participate.[455] Here, the Court found that Husky was not a signatory to the Contract and was not pursuing its claims by stepping into the "contractual shoes" of the signatories.[456] Rather, Husky was merely claiming under the terms of the Contract that expressly extended the benefit of certain warranties to it.[457]

The Court of Appeal held that although privity of contract requires that contracts cannot confer rights or impose obligation on non-parties, "[t]he doctrine [may] be relaxed where non-parties seek to rely on contractual provisions made for their benefit."[458] Consequently, Husky was a proper third-party beneficiary under the Contract and entitled to enforce its warranty rights.

However, the Court of Appeal was careful to distinguish the principled exemption to privity as it applied to "benefits" versus "obligations," including procedural burdens.[459] The Court of Appeal clarified that where contracting parties seek to impose an obligation on a non-signatory, such as a mandatory arbitration clause, the language of the contract must be "clear and explicit."[460] A party seeking to impose obligations on a non-signatory will not be successful unless these are clear and explicit because non-signatories are typically not privy to the circumstances, context, and intentions of contracting parties.[461]

The Court of Appeal agreed with the application judge that the Contract did not have a clear and explicit provision that required Husky to pursue its warranty claim through

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[452] *Ibid* at paras 15–16.
[453] *Ibid* at para 17.
[454] *Ibid* at paras 34–35.
[455] *Ibid* at para 21.
[456] *Ibid* at para 24.
[457] *Ibid*.
[458] *Ibid* at paras 25–26.
[459] *Ibid* at para 28.
[460] *Ibid* at para 32.
[461] *Ibid* at para 31.

arbitration.[462] As such, Husky should not have been deprived of its ability to pursue a court action to enforce its warranty rights.[463]

#### 4. COMMENTARY

*Husky* serves to highlight the importance of the language of arbitration clauses in a contract. In the absence of clear and express language in the contract, it is unlikely that a court will impose the obligation of arbitration upon non-parties to an agreement.

If parties to a contract truly seek to capture *all disputes* arising under the contract, they should include clear and express language that the mandatory arbitration clause applies to parties and third party beneficiaries under the contract. Further, parties to the contract may benefit in acting prudently by bringing the arbitration clause to the attention of the third party beneficiary to avoid any confusion or obfuscation of the appropriate avenue for dispute resolution.

## IX. EMPLOYMENT

### A. *KIRKE V. SPARTAN CONTROLS LTD.*

#### 1. BACKGROUND

*Kirke v. Spartan Controls Ltd.*[464] involved an appeal from a summary trial decision in which the lower court considered whether the defendant, Spartan Controls Ltd. (Spartan) had given the employee reasonable notice prior to his termination. Neither party challenged the reasonable notice period of 20 months, but the parties disagreed about whether Mr. Kirke's damages included any loss of payments he would have received as part of Spartan's shareholder profit sharing (SHPS) program. The lower court found that the SHPS payments were part of Mr. Kirke's total compensation, but his claim to damages was limited because Mr. Kirke had signed an agreement allowing Spartech, Spartan's parent company, to "buy back employee-owned shares at any time on 90 days' notice" (the Buy Back Clause).[465]

#### 2. FACTS

The SHPS program was available to all permanent employees who had been at the company for three years. The company used the money from the issuance of shares to grow and develop Spartan's operations. Mr. Kirke had purchased 73,600 shares over his time at the company, beginning in 2000.[466] At the time, he had signed a unanimous shareholder agreement (USA) which contained the Buy Back Clause.[467]

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462 *Ibid* at para 35.
463 *Ibid*.
464 2025 ABCA 40 [*Kirke*], leave to appeal to SCC requested, 2025 CanLII 104260 (CanLII).
465 *Ibid* at para 4.
466 *Ibid* at para 7.
467 *Ibid*.

When Mr. Kirke was terminated on 4 April 2022, his termination letter stated that he was required to sell the shares he purchased through the SHPS program back to Spartan.[468] He received the share price in 2022 for such shares.

In his summary trial, Mr. Kirke argued that but for his wrongful dismissal, he would not have sold these shares and would have received SHPS payments.[469] He argued that nothing in the common law or the USA limited his right to claim for damages in this regard.[470] Spartan argued that "Mr. Kirke received [the shares] in his capacity as a shareholder, not … an employee," and as such, he had no claim of damages over the shares.[471]

The summary trial judge found that the SHPS payments were part of Mr. Kirke's total employment compensation, and he was entitled to claim these during the reasonable notice period.[472] However, Mr. Kirke's claim for damages was only for the "limited period of 90 days from the date of receipt of notice."[473]

Mr. Kirke appealed the decision, arguing that the summary trial judge had erred in deciding that the USA limited Mr. Kirke's wrongful dismissal damages.[474]

### 3. DECISION

The Court of Appeal of Alberta found that Mr. Kirke's right to retain the shares and receive SHPS payments was contingent on his active employment and Spartech being able to buy back the shares.[475] The plain language in the USA unambiguously gave Spartech "an unrestricted right to buy back Mr. Kirke's shares at any time upon 90 days' notice."[476]

Specifically, the language in section 2.4 of the USA stated that if the shareholder's employment with the company was terminated, then "the Company shall have the exclusive right (but not the obligation) to purchase all (but not less than all) Shares then owned by such Shareholder."[477] The notice period to do this was 90 days after the termination of employment.[478] Section 2.6 of the USA also stated that at any time, with 90 days' notice, the company could "require that the Shareholder sell all or a part of the Shares then owned by such Shareholder to the Company."[479]

In rendering its decision, the summary trial judge considered the test for whether damages for breach of an implied term include bonus payments and other benefits established in *Matthews v. Ocean Nutrition Canada Ltd*.[480] The first is whether the employee would "have

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468 *Ibid* at para 8.
469 *Ibid* at para 10.
470 *Ibid*.
471 *Ibid* at para 11.
472 *Ibid* at para 13.
473 *Ibid*.
474 *Ibid* at para 19.
475 *Ibid* at para 21.
476 *Ibid*.
477 *Ibid* at para 7.
478 *Ibid*.
479 *Ibid*.
480 2020 SCC 26 [*Matthews*].

been entitled to the bonus or benefit as part of their compensation during the reasonable notice period", and the second is whether the "terms of the employment contract or bonus plan unambiguously … limit that … right."[481] The Court of Appeal agreed with the summary trial judge and found that the terms in the USA were clear and ambiguous. As such, Mr. Kirke was limited in his ability to receive damages for the loss of SHPS payments during the reasonable notice period.[482]

The Court also did not find that Spartan had engaged in any form of oppression or bad faith, or that Mr. Kirke had a reasonable expectation that he did not need to sell his shares back to Spartech if he was terminated.[483] It was always the norm that employees participating in the SHPS program would need to sell their shares back to Spartech upon termination, as per the USA.[484]

The Court dismissed the appeal and cross-appeal and upheld the summary trial judge's decision.

#### 4. COMMENTARY

This case exemplifies the importance of clear language in employer shareholder agreements to limit employee entitlements upon termination. Energy companies that compensate employees with shares should consider the language in their shareholder agreements and ensure that such language is clear and unambiguous with respect to employee entitlements to shares at termination. Assuming that these terms are clear and unambiguous and there is no indication that the employer repudiated on the contract, courts will typically uphold them.

Although the Court did not specifically touch on the timeliness of buy back provisions, its analysis suggests that employees need to be aware of these clauses prior to termination and within their termination letters — companies cannot retroactively enforce on this right. This case also provides a helpful analysis of how courts apply *Matthews* and when they will enforce contractual limits on common law rights.

### B. *GREAT NORTH EQUIPMENT INC. V. PENNEY*

#### 1. BACKGROUND

*Great North Equipment Inc. v. Penney*[485] concerned whether a ten-month injunction enforcing non-solicitation, non-competition, and no use of confidential information obligations should be extended by an additional year.[486] The Alberta Court of King's Bench found that there was no justification to extend the injunction period.

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[481] *Kirke*, *supra* note 464 at para 12; *Matthews*, *supra* note 480 at para 55.
[482] *Kirke*, *supra* note 464 at paras 4, 28.
[483] *Ibid* at para 23.
[484] *Ibid*.
[485] 2024 ABKB 533.
[486] *Ibid* at para 1.

## 2. FACTS

The respondents were employees of Great North Equipment (GNE) who left GNE to work for a competitor in the oilfield equipment market. GNE filed an application for an interim injunction barring the respondents from competing with, soliciting customers from, or using GNE's confidential equipment. The parties agreed to a ten-month injunction in response to the injunction application. This injunction was later extended several times because of further applications.

GNE relied on non-competition and non-solicitation restrictive covenants within a shareholders' agreement (the Shareholders Agreement) both for the initial interim injunction application and as the basis to extend the injunction. Two of the respondents, Mr. Penney and Mr. MacDonald, had not signed the original agreements, but GNE argued that they became parties to the Shareholders Agreement through downstream agreements.[487] The respondents argued that these agreements were not binding on them.

GNE also contended that the respondents were fiduciaries and owed fiduciary duties to GNE for two years from their departure.[488] GNE pointed to alleged offside conduct, including the respondents contacting GNE's clients, in support of its position that the injunction should be extended.[489] While much of the alleged offside conduct occurred during the respondents' employment with GNE and shortly after (that is, during the interim injunction period), GNE argued that this behaviour represented conduct that continued to damage its client relationships.[490]

GNE further took the position that the respondents were misusing confidential information, such as sharing it with their new employer.[491] GNE sought to have the current injunction banning the use of confidential information extend to the new employer, who was not a party to the original consent injunction.[492]

## 3. DECISION

The Court held that Mr. Penney and Mr. MacDonald were not bound by the Shareholders Agreement. First, the restrictive covenants sought to make fundamental changes to both Mr. Penney and Mr. MacDonald's employment contracts without GNE providing any consideration for them taking on the burdens of the Shareholders Agreement.[493] Second, Mr. MacDonald was not a shareholder and as such, was not subject to the restrictive covenants in the Shareholders Agreement.[494]

Furthermore, the Court held that even if there was consideration or consideration was not required, GNE did not provide the respondents with copies of the Shareholders Agreement

[487] *Ibid* at paras 16–17.
[488] *Ibid* at para 62.
[489] *Ibid* at para 68.
[490] *Ibid*.
[491] *Ibid* at para 93.
[492] *Ibid* at para 99.
[493] *Ibid* at para 32.
[494] *Ibid* at para 30.

or notify them as to its terms, such as the restrictive covenants.[495] This ultimately rendered the restrictive covenants in the Shareholders Agreement unenforceable.[496] The Court held that, in terms of extending the injunction, there was no serious issue to be tried.[497]

The Court did not find that the respondents had engaged in any offside conduct or any behaviour that materially damaged GNE's client relationships.[498] The three respondents had only been employed with GNE for a small amount of time and there was no explanation as to why the "fiduciary period"[499] (the amount of time, post-employment, that the fiduciary continued to owe duties to the employer) ought to be extended.[500] Ultimately, any offside conduct had occurred during or before the interim injunction, and there was no reason to extend the injunction to repair any damage.[501]

Lastly, the Court found that GNE had put many of the documents over which it was seeking confidentiality into the court record.[502] As such, GNE had waived confidentiality. Even if the new employer received the information from the respondents, GNE's actions effectively released the new employer from any responsibility for using that information.[503] Therefore, there was no serious issue to be tried on the possible use of this information.[504]

Ultimately, the Court held that the balance of convenience favoured the respondents and they should be allowed to compete freely in the market.[505] The injunction was terminated.[506] This decision was largely upheld by the Court of Appeal with some minor changes to the order.[507]

### 4. COMMENTARY

This case highlights the importance of clear and express terms and conditions, particularly with respect to restrictive covenants. Energy companies that seek to impose restrictive covenants on employees must be cautious in the implementation of such obligations to ensure they are ultimately enforceable.

An employee must be provided with notice of such obligations along with all relevant documentation at the outset of implementation. Employees must also receive proper consideration for entering into such obligations in order for them to be enforceable. This case

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495 *Ibid* at para 39.
496 *Ibid* at para 60.
497 *Ibid* at para 92.
498 *Ibid* at paras 69, 73.
499 *Ibid* at para 64.
500 *Ibid* at paras 87–88.
501 *Ibid* at para 73.
502 *Ibid* at para 118.
503 *Ibid* at para 120.
504 *Ibid* at para 122.
505 *Ibid* at para 132.
506 *Ibid* at para 135.
507 The Court of Appeal found that it was not for the chambers judge to grant summary judgment regarding portions of the first consent order. These were to remain in force until a trial. As such, the Court amended the order to include the fact that paragraphs 7(a) to (c) of the first consent order "continue until a trial judge disposes of the case.": *Great North Equipment Inc v Penney*, 2025 ABCA 16 at paras 11, 15 [*Great North* ABCA].

serves as a reminder that courts are often hesitant to place limits on an employee's ability to seek employment in their area of expertise.

## X. TAX

### A. *GLENCORE CANADA CORPORATION V. CANADA*

#### 1. BACKGROUND

Break fees and commitment fees are commonly used in deals by oil and gas companies. They typically represent 1 percent to 7 percent of a deal's purchase price. Break fees are triggered when a transaction fails to close and often represent significant value to the spurned purchaser. However, there has been some confusion as to how these fees should be classified under the *Income Tax Act*[508] as income (100 percent taxable) or capital (50 percent taxable). *Glencore Canada Corporation v. Canada*[509] serves as a cautionary tale for taxpayers drafting agreements with break fee provisions. The Canada Revenue Agency (CRA) is not bound to follow the taxpayer's characterization and could assert an adverse result if such provisions are not carefully drafted.

#### 2. FACTS

Diamond Fields Resources Inc. (Diamond Fields) was the target of a bidding auction in 1996. Falconbridge Limited (Falconbridge), a predecessor of Glencore Canada Corporation (Glencore), was one of the bidders. During the bidding process, Falconbridge entered into a merger agreement (the Agreement) to acquire Diamond Fields in exchange for $4.1 billion. Ultimately, Diamond Fields backed out of the Agreement when they received a superior offer from Inco Ltd. (Inco).[510]

A commitment fee and a break fee (the Fees) totalling over $101 million formed part of the Agreement. Diamond Fields paid the Fees when they accepted the Inco offer. Falconbridge reported the Fees as income, under section 9 of the *Income Tax Act*, with the view of challenging the characterization once the CRA assessed Falconbridge's income tax return and accepted its reporting of the Fees. Glencore appealed the reassessment to the Tax Court of Canada. Glencore argued that the Fees were not properly included in their income, or in the alternative, that the Fees were a capital gain. The Tax Court upheld the reassessment.[511]

Glencore further appealed to the Federal Court of Appeal. Three issues were raised: "(i) Did the Tax Court err in concluding that the Fees were business income per s 9(1) … ii) Did the [break fee] give rise to a capital gain? [and] iii) Should the Fees be included in computing income from a business" as an inducement under section 12(1)(x) of the *ITA*?[512]

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508 RSC 1985, c 1 [*ITA*].
509 2024 FCA 3 [*Glencore*], leave to appeal to SCC refused, 2024 CanLII 74742 (SCC).
510 *Ibid* at paras 8–11.
511 *Ibid* at para 18.
512 *Ibid* at para 20.

### 3. DECISION

The Federal Court of Appeal started with an analysis of whether the Fees were business income under section 9 of the *ITA*.[513] The Tax Court had applied the decision of *Ikea Ltd. v. Canada*[514] to determine that the Fees were business income. However, the Federal Court of Appeal ruled that the Tax Court had incorrectly interpreted the principles of *Ikea*. The Tax Court relied on the language in *Ikea* which linked the receipt of a tenant inducement payment to the normal business operations of Ikea Ltd. (and thus, section 9 income) to classify the Fees as business income. However, *Ikea* dealt with the distinction between revenue and capital accounts in distinguishing business income.[515] The Tax Court interpreted *Ikea* in a manner that effectively ignored the differences between capital and revenue receipts.[516] The Court of Appeal found that in the present case, the Fees had no linkage to revenue.[517] Therefore, the Fees were not section 9 income.[518]

Next, the Court of Appeal turned to whether the Fees gave rise to a capital gain. Glencore submitted that the break fee constituted a disposition of its right to merge with Diamond Fields, which was a disposition of property, and thus, a capital gain.[519] However, based on the terms of the Agreement, no such right was provided.[520] There was no "right to merge" and therefore no proceeds of disposition which would give rise to a capital gain.[521] This finding was based on the fact that the merger offer was made to Diamond Fields' shareholders (who were not party to the Agreement) and Diamond Fields' directors had a fiduciary duty to support a superior bid.[522]

Finally, the Court of Appeal assessed whether the Fees could be classified as income under section 12(1)(x) of the *ITA*. This was a fresh argument that the Crown had not argued at the Tax Court.[523] To qualify as taxable income under section 12(1)(x) of the *ITA*, the Fees had to meet two requirements. First, the amount received had to "reasonably be considered to have been received … as an inducement."[524] The Federal Court of Appeal had no difficulty concluding that the Fees were a form of inducement enticing Falconbridge to enter into the Agreement (despite being paid upon the termination of the Agreement).[525]

Second, section 12(1)(x)(i)(A) of the *ITA* contains a general requirement that the amounts had to be received "in the course of earning income from a business or property."[526] Because Falconbridge was a nickel and mining company which required ore deposits (which Diamond Fields had), the Fees were earned in the course of these business activities.[527] Alternatively,

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513 *ITA*, *supra* note 508, s 9.
514 1998 CanLII 848 (SCC) [*Ikea*].
515 *Glencore*, *supra* note 509 at para 28.
516 *Ibid* at para 28.
517 *Ibid* at para 32.
518 *Ibid* at paras 32, 36.
519 *Ibid* at para 37.
520 *Ibid* at paras 40–43.
521 *Ibid* at para 44.
522 *Ibid* at para 43.
523 *Ibid* at para 45.
524 *ITA*, *supra* note 508, s 12(1)(x)(iii).
525 *Glencore*, *supra* note 509 at paras 53–61.
526 *ITA*, *supra* note 508, s 12(1)(x)(i)(A).
527 *Glencore*, *supra* note 509 at para 70.

the Fees were linked to shares that had the capacity to produce property income.[528] Either way, the Fees fell under the requirements of section 12(1)(x) of the *ITA* and could be included as income earned from business and property.[529]

### 4. COMMENTARY

*Glencore* offers a cautionary tale to those drafting provisions related to break fees and commitment fees. When a deal collapses, to avoid including such fees into a corporation's income, they should be characterized as damages for lost rights rather than an inducement to enter a transaction. The Federal Court of Appeal's conclusion that the Fees were not received from the disposition of property was largely based on the Agreement not providing a "right to merge." The decision suggests that had the Fees been structured as a proprietary right rather than a mere payment, it is possible they would have been classified as capital gains. However, that question remains open. Perhaps a different conclusion could have been reached had the Federal Court of Appeal considered the contractual rights under the Agreement more generally or the Agreement included different drafting. Given the significant value of the payments involved, it is important to consult with a legal professional to understand the courts' current interpretations of the provisions of the *ITA* and ensure agreements are drafted to achieve the desired taxation and withstand CRA scrutiny.

## B. *COOPERS PARK REAL ESTATE DEVELOPMENT CORPORATION V. THE KING*

### 1. BACKGROUND

The CRA is granted broad powers under the *ITA* to request an array of documents and information from taxpayers. However, information subject to solicitor-client privilege is protected.

*Coopers Park Real Estate Development Corporation v. the King*[530] discusses the Tax Court of Canada's decision that planning done by accountants is not protected by solicitor-client privilege. In *Coopers Park*, the Court was asked to determine a motion from the Minister of National Revenue (the Minister) to compel the appellant, Coopers Park Real Estate Development Corporation (Coopers), to provide its answers and responses to all outstanding questions.[531] The Minister sought, among other things, to have the Court assess Coopers' claim for solicitor-client privilege over particular documents.[532] The motion was granted in part and Coopers was ordered to provide such documents to the Minister as the documents did not meet the test for solicitor-client privilege.[533]

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528 *Ibid* at para 71.
529 *Ibid* at para 72.
530 2024 TCC 122 [*Coopers Park*].
531 *Ibid* at para 1.
532 *Ibid*.
533 *Ibid* at para 2.

## 2. FACTS

The underlying issue in this appeal was the application of the general anti-avoidance rule in the *ITA* (GAAR).[534] The Minister sought to deny Coopers' claims exceeding $68 million for losses, expenditures, and credits between the 2007 and 2009 taxation years on the basis that the GAAR applied.[535]

Examinations for discovery began in 2021, but neither party was satisfied with the production of documents and answers both in the initial virtual oral examinations and those in further undertakings and follow-up questions.[536] The Minister was unsatisfied and filed a motion requesting further responses, documents, and information.[537]

## 3. DECISION

Justice Hill addressed Coopers' assertion of solicitor-client privilege over certain documents on the basis that they formed "part of the chain of communication with counsel to obtain legal advice."[538]

The test for asserting solicitor-client privilege relies on the party claiming solicitor-client privilege to show, on a balance of probabilities, that a document is privileged.[539] If a party fails to lead evidence in support of its privilege claim, the court must make a decision solely on whether the document, on its face, appears privileged.[540] Coopers chose not to provide evidence to support their assertion.[541] In the face of insufficient supporting evidence, the Court was unable to conclude, on a balance of probabilities, that the majority of documents were subject to solicitor-client privilege.[542]

Importantly, Justice Hill confirmed that no accountant-client privilege exists.[543] He stated that documents that contain business, accounting, or policy advice are not privileged.[544] Further, no privilege exists when an accountant gives "original and independent tax advice" to either a lawyer or client.[545] This applies even when the lawyer has an overarching responsibility to provide advice in the transaction.[546] But, if the accountant acts as a representative or agent for a client when obtaining legal advice from a solicitor, then solicitor-client privilege applies.[547]

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534 *Ibid* at para 3.
535 *Ibid*.
536 *Ibid* at para 4.
537 *Ibid* at paras 6–7.
538 *Ibid* at para 46.
539 *Ibid* at para 55.
540 *Ibid*.
541 *Ibid* at para 56.
542 *Ibid* at paras 59–60.
543 *Ibid* at paras 50–51.
544 *Ibid* at para 50.
545 *Ibid* at para 51.
546 *Ibid*.
547 *Ibid* at para 50.

After an analysis of the materials that were provided to the Court, Justice Hill determined that the majority of the materials were not privileged, and Coopers was required to disclose most of the documents requested.[548]

4. COMMENTARY

This case is a reminder for energy companies that solicitor-client privilege is unique and, in usual circumstances, will not apply to third party professionals (such as accountants or financial advisors). The case provides clarity to the narrow circumstances in which these professionals will be protected by the solicitor-client relationship, both in tax planning and generally. Specifically, an accountant can act as a representative or agent for a client in obtaining legal advice from a law firm.

*Coopers Park* is a cautionary case for accountants to not overstep their role by offering original and independent tax advice when acting as an agent for a client because such advice will not be protected by solicitor-client privilege. If an organization wishes for materials related to tax planning to be protected by privilege, then retainers with law firms must be carefully drafted to ensure that these individuals are included within the scope of privilege. Care should also be taken to ensure that privilege is not inadvertently waived. Tax advice from a lawyer should be sought at the outset of an engagement to ensure the protection of legal and accounting tax advice.

548 *Ibid* at paras 50–86.