RECENT JUDICIAL DECISIONS OF INTEREST TO ENERGY LAWYERS

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This article summarizes a number of recent judicial decisions of interest to energy lawyers. The authors review and comment on the past year's case law in several areas, including Aboriginal law, environmental law, employment law, contractual interpretation, enforcement of foreign judgments, surface rights, utility regulation, and selected developments in civil procedure. Specific topics addressed include the availability of summary judgment for operators' claims in the face of countervailing non-operators' claims, recent appellate case law regarding the duty to consult, and the application of the "polluter pays" principle in contaminated sites litigation.

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I. ABORIGINAL

A. *THOMAS V. RIO TINTO ALCAN INC.*[1]

1. BACKGROUND

In *Thomas*, the Saik'uz and Stellat'en First Nations (Nechako Nations) appealed a decision of the British Columbia Supreme Court that determined that the Nechako Nations

[1] 2015 BCCA 154, [2015] 12 WWR 67 [*Thomas*].

could not bring a tort claim prior to a court declaration recognizing their Aboriginal title and rights to the land that was the subject of the tort claim.

2. FACTS

The Nechako Nations sought an injunction to prevent the diversion of water by Rio Tinto Alcan Inc. (Alcan) at the Kenney Dam (the Dam) on the basis that the diversion had significant adverse impacts on the ecosystem of the Nechako River, over which they claimed Aboriginal title and rights.[2] The Nechako Nations advanced claims of private and public nuisance and breach of riparian rights as a result of the Dam operated by Alcan.[3] As the basis for these claims, the Nechako Nations asserted that they had Aboriginal rights and title to certain lands and the adjacent Nechako River, though their rights and title claim had not yet been proven.

In response, Alcan brought an application seeking: (1) an order for summary judgment on the basis that the *Industrial Development Act*[4] and various agreements entered into between Alcan and the Province of British Columbia related to the Dam (the Agreements) provided Alcan with a full defence to the claim given that statutory authority approved its operation of the Dam; and (2) an order striking out the rights and title portion of the Nechako Nations' claim on the basis that it constituted an impermissible "collateral attack"[5] in connection with Alcan's defence of statutory authority. In the alternative, Alcan sought an order striking out the entire claim on the basis that it did not disclose a reasonable cause of action.[6]

The chambers judge dismissed Alcan's application for summary judgment but granted its application to strike the entire claim on the basis that the common law concept of riparian rights has been extinguished by legislation in British Columbia, and that its claims in nuisance and for breach of riparian rights were based on asserted but unproven claims to Aboriginal title and rights or on an interest in a reserve under the *Indian Act*,[7] and had no reasonable chance of success.[8] Accordingly, the claim was dismissed. The Nechako Nations appealed, and Alcan cross-appealed the dismissal of its application for summary judgment.[9]

3. DECISION

In deciding whether or not to uphold the chambers judge's decision to strike the notice of civil claim, the British Columbia Court of Appeal applied the well-established test for striking a civil claim set out in *R. v. Imperial Tobacco Canada Ltd.*,[10] and considered whether it was "plain and obvious, assuming the facts pleaded to be true, that the pleading [disclosed] no reasonable cause of action."[11]

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2 *Ibid* at paras 22–25.
3 *Ibid* at para 4.
4 SBC 1949, c 31.
5 *Thomas*, *supra* note 1 at para 5.
6 *Ibid*.
7 RSC 1985, c I-5.
8 *Thomas*, *supra* note 1 at paras 31–33.
9 *Ibid* at paras 6–7.
10 2011 SCC 42, [2011] 3 SCR 45 [*Imperial*].
11 *Thomas*, *supra* note 1 at para 34, citing *Imperial*, *ibid* at para 22.

The Court found that the chambers judge erred in concluding that no reasonable cause of action existed until the Aboriginal rights and title asserted by the Nechako Nations were proven in court or recognized by the Crown. Such a conclusion incorrectly created a "unique pre-requisite to the enforcement of Aboriginal title and other Aboriginal rights."[12] The Court noted the well-established principle that Aboriginal rights and title exist whether or not they have yet been declared or recognized.[13] A court declaration or Crown acceptance simply identifies the exact nature and extent of the title or other rights.[14]

Furthermore, the test for striking a civil claim set out in *Imperial* requires that facts pled by the Nechako Nations should be assumed to be true.[15] Accordingly, the Aboriginal rights and title claims did not have to have been proven prior to the commencement of the action.[16]

The Court concluded that there was no principled reason to require the Nechako Nations to obtain a court declaration of their Aboriginal rights or title before they could commence an action that relies on such rights.[17] The Court found that the notice of claim should not have been struck because it was not plain and obvious, assuming the existence of the asserted Aboriginal rights, that the notice disclosed no reasonable cause of action.[18] The bulk of the Nechako Nations' appeal was allowed,[19] other than in respect of the claim for entitlement to riparian rights based on an interest in reserve lands, which was struck.[20]

The Court dismissed Alcan's cross appeal for summary judgment based on its defence of statutory authority.[21] Though the Agreements authorized construction of the Dam and the minimum amounts of water to be released, they did not explicitly mention how the Dam was to be constructed, the timing or manner of the releases, or the required characteristics of the water being released.[22] It remained unclear to the Court whether the Dam could possibly have been constructed to avoid the nuisance,[23] and accordingly, the applicability of the defence of statutory authority was a genuine issue to be determined at trial.[24]

4. COMMENTARY

This case clarifies that Aboriginal groups can rely on asserted rights and title to lands as the basis for a civil claim prior to having such rights or title recognized by the Crown or a court. The British Columbia Court of Appeal noted that the Nechako Nations would need to prove the rights asserted in their action against the Crown in order to be successful in the claims advanced. Leave to appeal the case to the Supreme Court of Canada was refused.[25]

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12 *Ibid* at para 61.
13 *Ibid*.
14 *Ibid*.
15 *Ibid* at para 34, citing *Imperial*, *supra* note 10 at para 22.
16 *Thomas*, *ibid* at para 59.
17 *Ibid* at para 66.
18 *Ibid* at para 60.
19 *Ibid* at para 79.
20 *Ibid* at paras 85, 90.
21 *Ibid* at para 105.
22 *Ibid* at para 102.
23 *Ibid*.
24 *Ibid* at para 105.
25 [2015] 12 WWR 67 (BCCA), leave to appeal to SCC refused, 36480 (15 October 2015).

B. *LUBICON LAKE NATION V. PENN WEST PETROLEUM LTD.*[26]

1. BACKGROUND

In *Lubicon Lake Nation*, the issue before the Alberta Court of Queen's Bench was whether an action (the Penn West Action) commenced by Bernard Ominayak, Chief of the Lubicon Lake Nation (Ominayak), and five councillors of the Lubicon Lake Nation (LLN; collectively, the Respondents) against Penn West Exploration Ltd. and Penn West Exploration (Penn West) was: (1) an abuse of process because it nearly duplicated an action (the Crown Action) the Respondents had brought against the federal and provincial Crown (Canada and Alberta); and (2) a collateral attack on approvals granted to Penn West regarding roads, drilling, mineral leases, facilities, and pipelines (the Approvals).[27] Penn West applied to have the Respondents' statement of claim struck.

2. FACTS

The Lubicon Lake Cree (Lubicon Cree) assert Aboriginal title and rights in traditional lands east of Peace River, Alberta.[28] Two groups claim to represent them. The Chief and council of the Lubicon Lake Band (LLB) are recognized by the federal and provincial governments as the elected representatives of the Lubicon Cree and as appropriate intermediaries for consultation, while the Respondents are not so recognized.[29]

The Respondents commenced the Crown Action in June 2013, asserting Aboriginal title and rights claims in lands east of Peace River, Alberta. Penn West was not a defendant. The Penn West Action, commenced five months later, sought a declaration that the Approvals granted to Penn West for oil production in the claimed area were illegal and void, and alleged trespass and interference with rights in certain small parcels of land within the claimed area.[30]

Penn West, before carrying on its activities on the claimed lands, consulted with the Lubicon Cree, and was advised by the provincial government that its consultation was adequate.[31] Penn West's consultation log indicated that Ominayak had no concerns with its development program.[32] The LLN unsuccessfully challenged certain approvals Penn West had obtained, and did not apply for judicial review of its unsuccessful challenge.[33]

3. DECISION

While "identical to the Crown action in many respects,"[34] the Penn West Action was not duplicative.[35] It involved different defendants and causes of action, and public rather than

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26 2015 ABQB 342, [2015] 3 CNLR 156 [*Lubicon Lake Nation*].
27 *Ibid* at para 1.
28 *Ibid* at para 5.
29 *Ibid* at para 6.
30 *Ibid* at para 2.
31 *Ibid* at paras 8, 10.
32 *Ibid* at para 9.
33 *Ibid* at para 12.
34 *Ibid* at para 37.
35 *Ibid* at para 38.

private claims.[36] The concern that inconsistent verdicts might result could be addressed by consolidation of the actions or the adjournment of one action pending resolution of the other.[37]

The Respondents' claim to nullify the Approvals constituted a collateral attack.[38] To allow the nullification claim even though the LLN had not sought an available judicial review would render "the tribunal, judicial review and appellate review process irrelevant."[39] Parties could disclaim any concern at the consultation stage and later seek to invalidate regulatory approvals through a claim of Aboriginal rights.[40]

4. COMMENTARY

Lubicon Lake Nation follows the Supreme Court of Canada's decision in *Behn v. Moulton Contracting Ltd.*,[41] which held that an Aboriginal rights-based challenge to timber licences whose validity had not been challenged when the licences were issued was a collateral attack.

The Supreme Court also applied the decision in *Thomas*,[42] which held that claims in nuisance and breach of riparian rights should not be summarily dismissed simply because the Aboriginal rights upon which they were predicated had — like the rights asserted by the Lubicon Cree — not yet been established.

C. *BUFFALO RIVER DENE NATION V. SASKATCHEWAN (MINISTER OF ENERGY AND RESOURCES) ET AL.*[43]

1. BACKGROUND

In *Buffalo River*, the Saskatchewan Court of Appeal considered whether a grant of subsurface exploration permits (Permits) for oil sands beneath lands subject to *Treaty No. 10*[44] triggered the Crown's duty to consult.

2. FACTS

Under *Treaty No. 10*, the Buffalo River Dene Nation (BRDN) are entitled to practise their traditional uses of the lands subject to the treaty. In 2012, the Saskatchewan Minister of Energy and Resources (the Province) posted the Permits for sale. Without consulting with the BRDN, the Province granted two Permits that included subsurface rights beneath the *Treaty No. 10* lands.

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36. *Ibid*.
37. *Ibid* at para 42.
38. *Ibid* at para 43.
39. *Ibid* at para 55.
40. *Ibid*.
41. 2013 SCC 26, [2013] 2 SCR 227.
42. *Thomas*, *supra* note 1.
43. 2015 SKCA 31, 457 Sask R 71 [*Buffalo River*].
44. *Treaty No 10 and Reports of Commissioners*, 1907, online: <https://www.aadnc-aandc.gc.ca/eng/1100100028870/1100100028872> [*Treaty No. 10*]

The BRDN sought judicial review of the Province's decision to issue the Permits without consultation. The Saskatchewan Court of Queen's Bench agreed with the Province that no duty to consult arose in the circumstances.[45] The BRDN appealed.

3. DECISION

The three part test to determine whether the Crown has a duty to consult considers: (1) the existence of an Aboriginal right or claim; (2) the impugned Crown conduct; and (3) the potential for the conduct to cause an adverse effect.[46] In its appeal, the BRDN argued that potential adverse effects might result from the Permit holder's attempts to access or exploit the subsurface minerals beneath the treaty lands.[47]

The Court of Appeal upheld the decision of the Court of Queen's Bench primarily on the basis that the Permits could not adversely affect the *Treaty No. 10* lands as they did not grant access to such lands. The Permits granted only subsurface rights, whereas the BRDN's claimed treaty rights related to surface rights.[48] The existence of two distinct rights with "no intersection,"[49] meant there was no conflict between the Province's issuance of the Permits and the existence of the BRDN on the treaty lands.[50] Thus, the permitting process did not trigger the Province's duty to consult.[51] If rights to access the treaty lands came under contemplation later, then the duty to consult would arise at that time.[52]

The Court of Appeal found there was no evidence of a foreseeable impact on the treaty lands arising from the Permits alone.[53] In order to establish a potential adverse impact, the impugned conduct must have "some *appreciable* and *current* potential"[54] negative effect on the BRDN's treaty rights. The Permits themselves did not present a potential adverse impact, as a second stage surface access approval from the Province would be required before any development affecting the surface of the treaty lands could occur.[55]

4. COMMENTARY

Buffalo River indicates that courts will be reluctant to recognize a duty to consult in relation to the issuance of permits for subsurface exploration where second stage approval is required for development and subsurface access. Permit holders are unlikely to adversely affect lands by simply holding subsurface rights. However, the result would almost certainly have differed had surface access or other development rights been contemplated at the time the Permits were issued.

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[45] *Buffalo River Dene Nation v Saskatchewan (Minister of Energy and Resources) et al*, 2014 SKQB 69, 440 Sask R 1.
[46] *Buffalo River*, *supra* note 43 at para 35, citing *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650.
[47] *Buffalo River*, *ibid* at para 84.
[48] *Ibid* at para 88.
[49] *Ibid*.
[50] *Ibid*.
[51] *Ibid* at para 83.
[52] *Ibid* at para 89.
[53] *Ibid* at para 92.
[54] *Ibid* at para 90 [emphasis in original].
[55] *Ibid* at para 92.

D. *MOULTON CONTRACTING LTD. V. BRITISH COLUMBIA*[56]

1. BACKGROUND

In *Moulton Contracting*, the British Columbia Court of Appeal declined to impose liability on the Crown in response to allegations of inadequate consultation with First Nations in the context of a dispute that led to a First Nations blockade. The case is also noteworthy for the Court's consideration of the Supreme Court of Canada's decision in *Bhasin v. Hrynew*.[57]

2. FACTS

In 2006, the Province of British Columbia (the Province) granted Moulton Contracting Ltd. (Moulton) two timber sale licences (the Licences) that allowed Moulton to harvest timber from lands covered by *Treaty No. 8*,[58] which governs lands in British Columbia, Alberta, Saskatchewan, and the Northwest Territories.[59] The Province wrote to George Behn, a Fort Nelson First Nation (FNFN) member, to advise him of the Licences that covered lands upon which Behn's trapline was located. The Province had consulted with the FNFN, but Behn opposed the timber harvesting and expressed his intention to stop the logging. The Province did not inform Moulton of Behn's intention to stop the logging.[60]

Moulton began harvesting under the Licences and Behn advised the Province that he planned to block access to the harvest areas.[61] The Province then advised Moulton that there was a potential issue with Behn. Moulton responded by suspending its harvest and commenced an action against the Province, Behn, and the FNFN. A blockade was subsequently set up on the access road to the timber harvest areas by Behn and others.[62]

Moulton brought a claim against the Province for breach of contract and negligent misrepresentation. To give business efficacy to the Licences, the Supreme Court of British Columbia found that the Licences included the following implied term: "That the Province was not aware of any First Nations expressing dissatisfaction with the consultation undertaken by the Province, save as the Province had disclosed to Moulton Contracting."[63] The Supreme Court of British Columbia held that the Province's failure to inform Moulton of Behn's plan to block the timber harvest was a breach of this implied term.[64] The Province appealed.

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56 2015 BCCA 89, 381 DLR (4th) 263 [*Moulton Contracting*] leave to appeal to SCC refused, 36402 (22 October 2015).

57 2014 SCC 71, [2014] 3 SCR 494 [*Bhasin*].

58 *Treaty No. 8 Made June 21, 1899 and Adhesions, Reports, Etc*, 1899, online: <https://www.aadnc-aandc.gc.ca/eng/1100100028813/1100100028853> [*Treaty No. 8*].

59 *Moulton Contracting, supra* note 56 at para 9.

60 *Ibid* at para 21.

61 *Ibid*.

62 *Ibid*.

63 *Moulton Contracting Ltd v British Columbia*, 2013 BCSC 2348, 58 BCLR (5th) 70 at para 291.

64 *Ibid* at para 297.

3. DECISION

The Court of Appeal overturned the decision that the Province had breached an implied term of the Licences for two main reasons.[65]

First, the Court held that an incorrect test for whether to imply a term for business efficacy had been applied.[66] The proper legal test is whether the *actual* parties intended the term, not whether *reasonable* parties would have intended the term.[67] In this case, there was no support for the contention that the term implied by the trial judge was actually intended by the parties.[68] Additionally, the Licences contained clauses that limited the Province's liability, which the trial judge failed to properly consider. The Court found that these clauses suggested the Province should not incur liability for failing to inform Moulton of any dissatisfaction expressed by First Nations.[69]

Second, the Court disagreed with Moulton's assertion that *Bhasin* supported the inclusion of the implied term.[70] *Bhasin* recognized a duty of good faith in contracts that "plays a role in the law of implied terms";[71] however, the Court noted that "*Bhasin* clarifies that good faith is not an implied term, but is an organizing principle that manifests in particular doctrines, such as the duty of honest contractual performance."[72] The *Bhasin* duty requires contracting parties to perform their duties "honestly and reasonably and not capriciously or arbitrarily,"[73] a standard that the Province met despite failing to disclose Behn's threats to Moulton.[74]

The Court also found that the trial judge erred in finding the Province liable for negligent misrepresentation.[75] There was no evidence that the Province made any express representations regarding First Nations consultation or satisfaction, and no evidence that Moulton was induced to obtain the Licences due to any such representations.[76] According to the Court, there was no basis for imposing a duty to inform Moulton on the Province at any point.[77] In any event, the Licences expressly exempted the Province from liability for losses suffered due to third party acts, including the blockade and the threats made by Behn.[78]

4. COMMENTARY

The Supreme Court of Canada refused leave to appeal *Moulton Contracting* in 2015.[79] This case further evinces the uncertainty in application of the contractual duty of good faith from *Bhasin*. In this case, that duty did not give rise to a positive obligation on the Province to disclose the threats that had been made to Moulton. The Province was found to have acted

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65 *Moulton Contracting*, *supra* note 56 at para 78.
66 *Ibid* at para 59.
67 *Ibid* at paras 53–59.
68 *Ibid* at para 59.
69 *Ibid* at para 60.
70 *Ibid* at paras 66–67.
71 *Bhasin*, *supra* note 57 at para 44.
72 *Moulton Contracting*, *supra* note 56 at para 67.
73 *Ibid* at para 70, citing *Bhasin*, *supra* note 57 at para 63.
74 *Moulton Contracting*, *ibid* at para 76.
75 *Ibid* at para 106.
76 *Ibid* at paras 92–93.
77 *Ibid* at para 93.
78 *Ibid* at paras 100–105.
79 See *supra* note 56.

honestly and fulfilled its duty of good faith, despite not having disclosed known threats that could, and did, affect Moulton's ability to carry out its work. The case also makes it clear that the test for implying a term in a contract for business efficacy depends on the contracting parties' *actual* intentions.

E. *COASTAL FIRST NATIONS - GREAT BEAR INITIATIVE SOCIETY V. BRITISH COLUMBIA (MINISTER OF ENVIRONMENT)*[80] AND *BURNABY (CITY) V. TRANS MOUNTAIN PIPELINE ULC*[81]

1. BACKGROUND

In *Coastal*, the petitioners, Coastal First Nations (CFN), asked the Supreme Court of British Columbia to determine the validity of an equivalency agreement (the Agreement) between the National Energy Board (NEB) and the British Columbia Environmental Assessment Office (EAO). The Agreement had the effect of allowing projects to proceed after they obtain federal NEB approval, regardless of whether the projects had yet received a provincial environmental assessment certificate (EAC).

2. FACTS

In 2010, the NEB and the EAO entered into the Agreement regarding projects requiring approval under both the *Environmental Assessment Act*[82] and the *National Energy Board Act*.[83] Under the Agreement, the EAO agreed to accept the NEB's assessment of such projects under the *NEBA* as an equivalent assessment under the *EAA,* obviating any additional assessment requirements under the *EAA* and eliminating the need for an EAC, which is otherwise required by the *EAA*.[84] Northern Gateway Pipelines Limited Partnership's (NGPLP) proposed Northern Gateway Pipeline (NGP) was the first project to be subject to the Agreement.

The *EAA* requires the responsible Minister and the Minister of Environment to decide whether to issue an EAC.[85] The CFN submitted that the Agreement was invalid to the extent that it purported to abdicate the Province's jurisdiction to make a decision regarding the issuance of an EAC to approve a project with or without conditions.[86] The CFN argued that it exceeded the Province's authority to enter into such an arrangement, rendering the Agreement ultra vires.[87] In response, NGPLP asserted, among other things, that the NGP is a federal undertaking because of its interprovincial nature, and accordingly, is subject to exclusive federal jurisdiction.[88] It argued that any requirement to comply with British Columbia's environmental assessment process is unconstitutional as a result of the doctrines

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[80] 2016 BCSC 34, 85 BCLR (5th) 360 [*Coastal*].
[81] 2015 BCSC 2140, [2016] 5 WWR 332 [*Burnaby*].
[82] SBC 2002, c 43 [*EAA*].
[83] RSC 1985, c N-7 [*NEBA*].
[84] *Coastal*, *supra* note 80 at para 30.
[85] *EAA*, *supra* note 82, s 17(3).
[86] *Coastal*, *supra* note 80 at paras 81–82.
[87] *Ibid* at para 82.
[88] *Ibid* at para 43.

of paramountcy and interjurisdictional immunity, and that the *EAA* is of no force and effect in the context of interprovincial undertakings.[89]

3. DECISION

The Court concluded that a reviewable project must obtain an EAC under the *EAA* before any activity in relation to the project can begin. Once a project has been designated as reviewable, the *EAA* mandates an environmental assessment and an EAC.[90] While the Province does not have the authority under the *EAA* to refuse to grant an EAC altogether, it may impose conditions on reviewable projects under an EAC provided that such conditions do not impair the federal government's jurisdiction or create an operational conflict between the two legislative regimes.[91] The analysis of whether any conditions imposed by the Province conflict with federal jurisdiction can only be undertaken after the EAC is issued so that the effect of the specific conditions, if any, can be assessed.[92] If the conditions effectively prohibit a federally approved project from proceeding, the conditions will be declared inoperative to the extent that they conflict with the valid exercise of federal power.[93]

In respect of the Province's decision to enter into the Agreement, the Court found that it was neither correct nor reasonable.[94] Though the *EAA* does provide the responsible Ministers and the Executive Director with certain levels of discretion, such discretion does not extend to allow them to have entered into the Agreement and abdicate responsibility for conducting an assessment of a reviewable project and issuing an EAC.[95] Accordingly, the Court declared the Agreement invalid to the extent that it purported to remove the requirement for a proponent to obtain an EAC pursuant to the *EAA*.[96]

4. COMMENTARY

Coastal confirms that under the *EAA*, British Columbia is required to conduct an assessment for all projects that are reviewable.[97] The Province may not refuse to issue an EAC in respect of a project that has obtained NEB approval, but it may impose conditions on the project pursuant to the EAC that it issues so long as those conditions do not create an "impairment" or an "operational conflict" with the federal approval.[98]

NGPLP's arguments relating to the doctrines of paramountcy and interjurisdictional immunity relied on the British Columbia Supreme Court's decision in *Burnaby*.[99] In that case, Trans Mountain Pipeline ULC and Trans Mountain Pipeline LP (together, Trans Mountain) were the proponents of an expansion to the interprovincial Trans Mountain Pipeline system, which involved lands located in the City of Burnaby (the City).[100] The City

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89 *Ibid* at paras 43, 55.
90 *Ibid* at para 108.
91 *Ibid* at paras 55, 74, 181.
92 *Ibid* at para 76.
93 *Ibid* at para 61.
94 *Ibid* at para 93.
95 *Ibid* at para 106.
96 *Ibid* at para 183.
97 *Ibid* at para 182.
98 *Ibid* at para 74.
99 *Ibid* at para 59, citing *Burnaby*, *supra* note 81 at para 60.
100 *Burnaby*, *ibid* at paras 2, 4.

opposed the expansion project, asserting that it violated the City's bylaws, which purported to address traffic and parks, but had the effect of giving the City the power to prevent Trans Mountain from completing the excavation and engineering feasibility work required for the project.[101] In *Burnaby,* the Court held that interprovincial pipelines are within the jurisdiction of the federal government under the *NEBA*, and that the City's bylaws precluded "the practical operation of the federal undertaking in its core function."[102] In accordance with the doctrine of paramountcy, the bylaws were held to be constitutionally inoperative to the extent that their application "would frustrate the federal undertaking."[103] In *Burnaby* the City's bylaws, in effect, amounted to an outright prohibition of the expansion project;[104] whereas in *Coastal*, the Court distinguished *Burnaby* because the ability of the Province to assess and impose conditions on interprovincial projects would not definitively prohibit such projects from proceeding.[105]

F. *DANIELS V. CANADA (MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT)*[106]

1. BACKGROUND

In *Daniels*, the Supreme Court of Canada was asked to determine whether non-status Indians and Metis are "Indians" for the purpose of section 91(24) of the *Constitution Act, 1867*.[107]

2. FACTS

In 1999, Metis leader Harry Daniels commenced an action for declarations that: (1) Metis and non-status Indians are "Indians" under section 91(24) of the *Constitution Act*; (2) the federal Crown owes a fiduciary duty to Metis and non-status Indians; and (3) Metis and non-status Indians have the right to be consulted and negotiated with by the federal government in respect of all of their rights, interests, and needs as Aboriginal peoples.[108]

At trial, the Court declared that the Metis and non-status Indians should be considered "Indians" under section 91(24) of the *Constitution Act*, but declined to make the second and third declarations on the basis that they were "vague and redundant,"[109] and would simply be restatements of the law.[110]

The Federal Court of Appeal upheld the decision of the trial judge, but limited the application of section 91(24) of the *Constitution Act* to only those Metis who met the three requirements for Metis status for the purposes of section 35 of the *Constitution Act, 1982*,[111]

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101 *Ibid* at paras 6, 64.
102 *Ibid* at paras 59–60.
103 *Ibid* at para 77.
104 *Coastal*, *supra* note 80 at para 64.
105 Burnaby, *supra* note 81 at para 65.
106 2016 SCC 12, 395 DLR (4th) 381 [*Daniels*].
107 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act*].
108 *Daniels*, *supra* note 106 at para 2.
109 *Ibid* at para 8.
110 *Ibid* at paras 7–8.
111 Being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

as set out in *R. v. Powley*,[112] which, in brief, are: (1) self-identification as Metis; (2) an ancestral connection to a historic Metis community; and (3) acceptance by the modern Metis community.[113] Section 35 of the *Constitution Act, 1982* provides that Indian, Inuit, and Metis peoples are Aboriginal peoples for the purposes of the Constitution.[114] Like the trial judge, the Federal Court of Appeal declined to grant the second and third declarations.[115]

Daniels appealed to the Supreme Court of Canada to reinstate the trial judge's broader interpretation of the term "Indians," and to have the second and third declarations granted.[116]

3. DECISION

The Supreme Court of Canada unanimously agreed with the trial judge that the term "Indians" under section 91(24) of the *Constitution Act* refers to *all* Aboriginal peoples, including Metis and non-status Indians.[117]

In arriving at this decision, the Supreme Court noted that section 35 of the *Constitution Act, 1982* includes the Metis, and thus it would be inconsistent to exclude them from the definition of "Indians" in section 91(24).[118] The Supreme Court noted that section 35 of the *Constitution Act, 1982* includes Metis people as Aboriginal people.[119] Reading those sections together, it would be anomalous for Metis people to be recognized in section 35 of the *Constitution Act, 1982* but excluded from section 91(24) of the *Constitution Act* — the only one of the three listed groups to be excluded.[120]

The Court declined to apply the *Powley* criteria for determining who qualifies as Metis because that test was based on the community right to hunt for food under section 35 of the *Constitution Act, 1982*, rather than the Crown's jurisdiction over Indians under section 91(24) of the *Constitution Act*.[121] The Court emphasized that the question of who qualifies as a non-status Indian or Metis is a fact-driven question that must be answered on a case-by-case basis.[122]

In respect of the second and third declarations, the Supreme Court of Canada agreed with the lower courts that such declarations would lack practical utility because they would be restating settled law, and accordingly the declarations were not granted.[123]

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112 2003 SCC 43, [2003] 2 SCR 207 [*Powley*].
113 *Daniels*, *supra* note 106 at para 48.
114 *Supra* note 111, s 35.
115 *Daniels*, *supra* note 106 at para 9.
116 *Ibid* at para 10.
117 *Ibid* at paras 49–50.
118 *Ibid* at para 35.
119 *Ibid* at para 34.
120 *Ibid* at para 35.
121 *Ibid* at para 49.
122 *Ibid* at para 47.
123 *Ibid* at paras 52–56.

4. COMMENTARY

This decision clarifies significant jurisdictional ambiguity by finding that the federal government has jurisdiction over non-status Indians and Metis. Though it does not impose upon the federal government a duty to legislate in this area, it gives non-status Indians and Metis clear direction regarding where jurisdiction and accountability lies.

This case opens the door to First Nations rights claims that were previously unavailable to an estimated 400,000 non-status Indians and 200,000 Metis peoples in Canada, including for post-secondary education funding, non-insured health benefits, tax exemptions, and land claims.

While non-status Indians and Metis fall within the federal head of power under section 91(24) of the *Constitution Act*, provincial jurisdiction may also apply so long as it does not impair the core of the federal jurisdiction over "Indians."[124] This case reaffirms the Supreme Court of Canada's preference to favour the operation of both provincial and federal laws where possible.

II. CIVIL PROCEDURE

A. *WHITECOURT POWER LIMITED PARTNERSHIP V. ELLIOTT TURBOMACHINERY CANADA INC.*[125]

1. BACKGROUND

In this case, the Alberta Court of Appeal interpreted a recent amendment to Alberta's *Limitations Act*[126] that clarified the limitation period for a contribution claim pursuant to Alberta's *Tort-Feasors Act*.[127] The amendment was assented to on 17 December 2014,[128] but is deemed to have come into force on 11 March 1999.[129]

2. FACTS

A third party claim was commenced by Interpro Technical Services Ltd. (Interpro) against Elliott Turbomachinery Canada Inc. (Elliott).[130] Interpro was a defendant in an action brought by Whitecourt Power Limited Partnership (Whitecourt), in which Whitecourt sought damages against Interpro in relation to work that was performed on a generator owned by Whitecourt.[131]

Interpro made a third party contribution claim against Elliott, alleging that some of the work that caused the damage was performed by Elliott, and that Elliott was retained directly

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124 *Ibid* at para 51.
125 2015 ABCA 252, 389 DLR (4th) 111 [*Whitecourt*].
126 RSA 2000, c L-12.
127 RSA 2000, c T-5.
128 *Whitecourt, supra* note 125 at para 33.
129 *Ibid* at para 36.
130 *Ibid* at para 1.
131 *Ibid* at paras 4–5.

by Whitecourt.[132] Whitecourt denied retaining Elliott and claimed that Elliott was hired by Interpro.[133]

Elliott brought an application for a summary dismissal of the third party claim, which included a contribution claim under common law and the *Tort-Feasors Act*. Elliot claimed that the limitation period for the third party claim had expired.[134] The application was dismissed on appeal by both the Master and the Court of Queen's Bench.[135] Elliott further appealed to the Alberta Court of Appeal.

3. DECISION

The Court of Appeal analyzed the recent amendment to the *Limitations Act* to determine whether Interpro's claim for contribution against Elliott pursuant to the *Tort-Feasors Act* was time barred. Following the December 2014 amendment, the *Limitations Act* clearly outlines a specific limitation period for contribution claims under the *Tort-Feasors Act*.[136] The Court summarized that this new limitation period "gives the defendant two years from the *later of* the date served *and* discoverability to seek indemnity from other tort-feasors."[137] The Court also outlined that the "defendant" referred to in that clause is the party that "ought to have known"[138] of a claim arising against a third party with which it is jointly liable, and not the plaintiff.

The Court stated that the limitation period for Interpro's contribution claim pursuant to the *Tort-Feasors Act* did not begin to run until Interpro was advised that Whitecourt "considered Interpro responsible for Elliott's actions."[139] Once advised, Interpro knew or ought to have known that a potential contribution claim against Elliott existed due to the alleged joint liability.[140]

Accordingly, the Court upheld the decision of the Court of Queen's Bench and accepted the Master's decision to deny the application for summary dismissal on the basis that Interpro's third party contribution claim was validly brought within the limitation period.[141]

4. COMMENTARY

This decision clarifies when the limitation period begins for a defendant who is the subject of a claim under the *Tort-Feasors Act* to make a contribution claim against a third party. Such questions may be of particular relevance to the energy industry, where multiple contractors are often engaged to complete projects.

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[132] *Ibid* at para 5.
[133] *Ibid* at para 6.
[134] *Ibid* at para 27.
[135] *Ibid* at paras 28–30.
[136] *Ibid* at paras 33–34, citing *Limitations Act*, *supra* note 126, s 3.
[137] *Whitecourt*, *ibid* at para 36 [emphasis in original].
[138] *Ibid* at para 37.
[139] *Ibid* at para 42.
[140] *Ibid*.
[141] *Ibid* at paras 28–30, 43.

B. *CHEVRON CORP V. YAIGUAJE*[142]

1. BACKGROUND

Foreign plaintiffs (the Plaintiffs) obtained a judgment of approximately US$9.51 billion in an Ecuadorian lawsuit against Chevron Corporation (Chevron).[143] They then sued in Ontario to enforce this judgment against Chevron and Chevron Canada, a seventh-level indirect Canadian subsidiary.[144] The Ontario Court of Appeal permitted the Plaintiffs to proceed against Chevron Canada, which had played no role in the Ecuadorian proceedings or judgment, and Chevron, which had no assets in Canada. Chevron and Chevron Canada appealed.[145]

2. FACTS

Chevron and Chevron Canada responded to the Ontario claim for recognition and enforcement of the Ecuadorian judgment with a motion to dismiss and permanently stay the matter on the basis that the Ontario Superior Court lacked jurisdiction.[146] The Superior Court held that while it did have jurisdiction, the proceeding should be stayed because Chevron lacked assets in and conducted no business in Ontario, and Chevron Canada's assets were not exigible in satisfying a judgment against Chevron.[147]

In overturning the stay of proceedings, the Ontario Court of Appeal held that to establish jurisdiction, only a real and substantial connection between the subject matter of the litigation and the foreign court was required.[148] This bar to jurisdiction is lower than the connection that is required before a Canadian court can assume jurisdiction over the substance of a foreign dispute.

3. DECISION

The Supreme Court of Canada dismissed the appeal. Its decision, which was limited to the issue of jurisdiction, held that the only prerequisite for jurisdiction to recognize and enforce a foreign judgment "is that the foreign court had a real and substantial connection with the litigants or with the subject matter of the dispute, or that the traditional bases of jurisdiction were satisfied."[149] The purpose of this test is to ensure that the foreign court properly assumed jurisdiction over the dispute.[150] A real and substantial connection between the dispute or defendant and the *enforcing* forum is not required;[151] the Canadian court is being asked to enforce an existing obligation, not create a new one, so concerns regarding conflict of laws or territorial overreach are not relevant. Further, the focus in an enforcement action is on the obligation created by the foreign judgment, not on the reasons underlying the

142 2015 SCC 42, [2015] 3 SCR 69 [*Chevron*].
143 *Ibid* at para 6.
144 *Ibid* at paras 8–9.
145 *Yaiguaje v Chevron Corp*, 2013 ONCA 758, 370 DLR (4th) 132 [*Chevron* ONCA].
146 *Chevron*, *supra* note 142 at para 11.
147 *Yaiguaje v Chevron Corp*, 2013 ONSC 2527, 361 DLR (4th) 489.
148 *Chevron* ONCA, *supra* note 145 at para 30.
149 *Chevron*, *supra* note 142 at para 27.
150 *Ibid* at para 34.
151 *Ibid*.

judgment.[152] The Supreme Court noted that as "[c]ross-border transactions and interactions continue to multiply … comity requires an increasing willingness on the part of courts to recognize the acts of other states."[153]

The Supreme Court held that jurisdiction was established over Chevron because it was a foreign debtor under the Ecuadorian judgment, attorned to the jurisdiction of the Ecuadorian courts, and was served *ex juris* at its head office. The Ontario courts had jurisdiction over Chevron Canada under traditional, presence-based jurisdiction, as it had a physical office in Ontario and representatives providing services in the province.

4. COMMENTARY

Chevron confirms that the barriers to establishing Canadian courts' jurisdiction over enforcement of a foreign judgment are fairly easily surmounted. With that said, all of the substantive defences to the enforcement proceeding remain open to Chevron and Chevron Canada. The result of this enforcement action may have implications for foreign companies with assets or subsidiaries operating in Canada.

III. CONTRACT

A. *STEWART ESTATE ET AL. V. TAQA NORTH LTD. ET AL.*[154]

1. BACKGROUND

A panel of the Alberta Court of Appeal issued three separate judgments on issues relating to the termination of oil and gas leases and remedies available for wrongful production. The panel concluded that all of the relevant leases expired, and that the trial judge erred in using the "royalty and bonus" approach, to assess damages.[155] This non-exhaustive summary canvasses four of the issues considered: (1) the standard of review for a trial judge's lease interpretation; (2) the analysis of termination of leases where an operator cites lack of an economic market as the reason for shut-in; (3) the assessment of damages for unlawful production; and (4) the liability of gross overriding royalty (GORR) owners for wrongful production.

2. FACTS

The Court interpreted five similarly worded leases, each of which had a ten year primary term.[156] The habendum clauses gave the lessee 90 days to recommence operations if production ceased after the primary term, and the leases remained in force so long as the operations continued or production resulted.[157] The third proviso of the habendum clauses also provided, in three variations, that if non-production was due to "lack of or an

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152 *Ibid* at para 43.
153 *Ibid* at para 75.
154 2015 ABCA 357, 607 AR 201 [*TAQA*], leave to appeal to SCC refused, 36810 (30 June 2016).
155 *Ibid* at para 1.
156 *Ibid* at paras 12–13.
157 *Ibid* at para 13.

intermittent market" or a cause "beyond the lessee's reasonable control," such period of non-production would not violate the lease (the Proviso).[158]

The relevant lands were pooled. In 1968, Well 7-25 (the Well) was drilled on the pooled lands, and it produced until it was shut-in in 1995.[159] Thereafter, shut-in payments were made until the Well was re-completed and put back on production in a different formation in 2001.[160] In 2005, the lessors commenced an action alleging that the leases terminated in 1995 when the Well was shut-in. They sought an accounting of profits, restitution, other compensation, and damages.[161]

The trial judge found that the Proviso applied, concluding that the leases had not terminated for a lack of production. In the event that damages were owed, the trial judge held that they should be assessed on the basis of the royalty and any signing bonus that would have been due rather than on the basis of disgorgement.[162]

Four of the issues the Court considered on appeal are discussed below.

3. DECISION

a. Applicable Standard of Review for an Oil and Gas Lease

A preliminary question was the standard of review. In the minority on this issue, Justice Rowbotham cited *Sattva Capital Corp. v. Creston Moly Corp.*[163] as establishing that the correctness standard was no longer generally applicable to questions of contractual interpretation except in limited circumstances.[164] The majority held that the proper standard of review was correctness.[165] Justice McDonald reasoned that because the contracts were standard form and non-negotiated (unlike in *Sattva*), it was impossible to determine the parties' intentions.[166] Justice O'Ferrall concurred, and held that the strict construction rule applied to petroleum and natural gas leases.[167]

b. Termination of the Leases

The Court unanimously agreed that the leases had terminated according to their terms, but differed on when the termination had occurred. The majority (Justices O'Ferrall and McDonald) held that the lessees could not rely on the Proviso's exception for non-production due to the lack of an economic market because they had, in essence, abandoned the Well in 1995.[168] Justice Rowbotham concurred that the leases had expired, but held that they had not

158 *Ibid*.
159 *Ibid* at paras 25–26.
160 *Ibid* at paras 26–27.
161 *Ibid* at paras 33.
162 *Ibid* at paras 35, 42.
163 2014 SCC 53, [2014] 2 SCR 633 [*Sattva*].
164 *TAQA*, *supra* note 154 at para 63.
165 *Ibid* at para 281, citing *Vallieres et al v Vozniak*, 2014 ABCA 290, 580 AR 326 at para 13.
166 *Ibid* at paras 76–80.
167 *Ibid* at para 339.
168 *Ibid* at para 395.

done so until January 2000, when it became economical and profitable to resume production.[169]

c. Assessment of Damages

The trial judge followed recent authority and held that if the leases had terminated, the proper methodology for assessing damages was based upon the royalty plus bonus approach.[170] The Court rejected that approach in this case. The majority on this issue (Justices Rowbotham and O'Ferrall) held that the Defendants should be required to disgorge the net revenues from production.[171] Justice MacDonald found that the lessees had not acted in good faith and would have awarded the gross revenues from production.[172]

d. Liability of the GORR Owner

The lessors also sued the GORR holder, Esprit Exploration Ltd. (Esprit), who received royalties from a working interest participant, Bonavista Energy Corporation (Bonavista). The Court unanimously agreed that Esprit was not jointly and severally liable for wrongful production.[173] But the Court divided on whether Esprit was liable to the lessors for wrongful conduct or to account for monies. The majority held that Esprit should not have received value from the wrongful production, and noted that Esprit's GORR was deducted as an expense from Bonavista's production income. The Court held that either Esprit or Bonavista was liable to the lessors for the value of the GORR.[174] Justice Rowbotham, in the minority on this issue, held that Esprit was not liable in agency, trust, or for disgorgement.[175]

4. COMMENTARY

The lack of consensus in the reasons of the Court's members requires that this decision be carefully parsed. And unfortunately, that lack of consensus leaves significant uncertainty going forward with respect to lease interpretation and the proper methodology for assessing damages in this context.

B. *BARAFIELD REALTY LTD. V. JUST ENERGY (B.C.) LIMITED PARTNERSHIP*[176]

1. BACKGROUND

In *Barafield*, the British Columbia Court of Appeal addressed whether contracts assigned pursuant to *Companies' Creditors Arrangement Act*[177] proceedings extinguish contractual rights of third parties.

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169 *Ibid* at para 126.
170 *Ibid* at para 42, citing *TDL Petroleums Inc v Montreal Trust Co et al*, 2001 SKQB 360, 223 Sask R 276; *Freyberg v Fletcher Challenge Oil and Gas Inc et al*, 2007 ABQB 353, 428 AR 102.
171 *Ibid* at para 9.
172 *Ibid* at para 314.
173 *Ibid* at para 252.
174 *Ibid* at para 468.
175 *Ibid* at paras 258–61.
176 2015 BCCA 421, 391 DLR (4th) 108 [*Barafield*].
177 RSC 1985, c C-36 [*CCAA*].

2. FACTS

Barafield Realty Inc. (Barafield) entered into a contract with CEG Energy Options Inc. (CEG) to purchase natural gas at a fixed rate for a period of five years (the Contract).[178] During the Contract term, CEG entered into bankruptcy and *CCAA* proceedings in Alberta, during which Just Energy (B.C.) Limited Partnership (Just Energy) purchased some of CEG's contracts, including the Contract.[179] The Alberta Court of Queen's Bench approved the sale through a vesting order under the *CCAA* (the Vesting Order) without any notice of the proceeding having been provided to Barafield.[180]

After receiving notice that Just Energy purchased the Contract, Barafield terminated the Contract on the basis that: (1) CEG's insolvency was a default for which Barafield could terminate the Contract; and (2) the assignment provisions of the Contract prohibited an assignment of the Contract by CEG without Barafield's consent, which it refused to provide.[181] Just Energy disputed the termination, asserting that the Vesting Order allowed for its acquisition of the Contract and the corresponding assignment without Barafield's consent.[182] Barafield continued to rely on its claim to a right to terminate, but paid for the natural gas based on invoicing from a third party from whom it had previously purchased gas at lower, market-based rates.[183] When the Contract ended, Barafield sued Just Energy for the difference between the price it paid Just Energy under the Contract and the (lower) price it would have paid to the third party.[184]

The British Columbia Supreme Court found that Just Energy's failure to obtain Barafield's consent to assign the Contract from CEG constituted a breach of the Contract which gave Barafield the right to terminate.[185] The trial judge also held that nothing, including the terms of the Vesting Order or the stay of proceedings granted under the *CCAA*, negated Just Energy's obligation to obtain Barafield's consent to assign the Contract. The Court awarded Barafield damages for breach of contract in the amount claimed. Just Energy appealed.

3. DECISION

The British Columbia Court of Appeal allowed the appeal, holding that if an assignment of the Contract required consent, and the Vesting Order did not constitute an automatic novation of the Contract, there was no contract between Barafield and Just Energy.[186] Just Energy, then, could not be liable to Barafield for the difference in prices it paid for natural gas because there was no privity of contract between the parties.[187]

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178 *Barafield, supra* note 176 at para 2.
179 *Ibid* at para 3.
180 *Ibid*.
181 *Ibid* at paras 10–11.
182 *Ibid* at para 5.
183 *Ibid* at paras 2, 5.
184 *Ibid* at para 6.
185 *Ibid*, citing 2014 BCSC 945, 2014 BCSC 945 (CanLII).
186 *Ibid* at para 19.
187 *Ibid* at paras 18–19.

Specifically, the Court found that there had not been a valid assignment of the Contract because CEG and Just Energy did not obtain Barafield's consent.[188] Additionally, it noted that Just Energy's asset purchase agreement with CEG explicitly outlined that Barafield's consent was required to assign the Contract. Barafield refused to consent to the assignment, and accordingly the Contract was not validly assigned to Just Energy.[189]

The Court then considered whether the Vesting Order overrode the Contract's requirement for CEG to obtain Barafield's consent for the assignment, as Just Energy claimed that the Vesting Order constituted, in effect, an automatic novation of the Contract.[190] The Court found nothing in the Vesting Order or the surrounding circumstances indicating that a novation of the Contract was intended.[191] Instead, the facts suggested that Just Energy was aware that Barafield's consent was required to assign the Contract.[192]

Finally, the Court addressed whether courts can make orders under the *CCAA* affecting the rights of third parties without giving notice to such third parties.[193] Just Energy argued that *CCAA* orders could abrogate third party rights, which, applied to this case, would result in Barafield being prohibited from terminating the Contract upon CEG's insolvency, and from refusing consent for the assignment to Just Energy.[194] The Court rejected this position, holding that "the best practice is to serve all counterparties to particular contracts that are sought to be assigned."[195] Accordingly, *CCAA* proceedings are generally not authorized to make decisions that affect the contractual rights of third parties without providing them with notice.

4. COMMENTARY

Barafield serves as a reminder that a *CCAA* order approving the assignment of a contract will not necessarily nullify the rights of third parties. Where consent to assignment is required for contracts being sold or otherwise disposed of in *CCAA* or other insolvency proceedings, and the court does not specifically waive the requirement for consent to such assignment, the parties must obtain the requisite consents in order for the assignment to be effective.

C. *PRECISION DRILLING CANADA LIMITED PARTNERSHIP V. YANGARRA RESOURCES LTD.*[196]

1. BACKGROUND

A Master of the Alberta Court of Queen's Bench interpreted a "bilateral no fault contract" (also known as a "knock-for-knock" agreement) for drilling daywork in the standard form negotiated between the Canadian Association of Oilwell Drilling Contractors and the

188 *Ibid* at paras 16–17.
189 *Ibid* at para 27.
190 *Ibid* at para 19.
191 *Ibid* at para 31.
192 *Ibid* at paras 32–33.
193 *Ibid* at para 34.
194 *Ibid*.
195 *Ibid* at para 35, citing *Veris Gold Corp, Re*, 2015 BCSC 1204, 26 CBR (6th) 310 at paras 56, 59–64.
196 2015 ABQB 433, 27 Alta LR (6th) 71 [*Precision*].

Canadian Association of Petroleum Producers.[197] The Court awarded the defendant drilling contractor summary judgment for its daily fees despite the plaintiff owner's allegation that it was the contractor's own failure to drill in a good and workmanlike manner that necessitated some of the drilling and caused monetary loss to the plaintiff. Rejecting the plaintiff's claim for set-off and counterclaim, the Court held that this result was dictated by the terms of the parties' contract.[198]

2. FACTS

Precision Drilling Canada Limited Partnership (Precision) was Yangarra Resources Ltd.'s (Yangarra) drilling contractor who ultimately drilled three wells. The first was successful.[199] Yangarra alleged that during a night shift, while drilling the second well, a Precision employee mixed the wrong chemical (sulfamic acid) into the well's drilling mud (instead of caustic potash).[200] Yangarra further alleged that Precision's employees then "either neglected to test or carelessly tested the drilling mud, and wrongly advised Yangarra's supervisor that the drilling mud was in order."[201] While Precision formally denied all allegations, Precision conceded (for the limited purpose of the summary judgment application) that an employee on the next day's shift realized from the empty packages what chemical had been added to the mud.[202]

As a result (it was assumed, for purposes of the summary judgment application) of the error, $300,000 of Yangarra's equipment was lost downhole despite Precision's attempts to extract it.[203] The second well had to be abandoned. Precision did some work on a third (relief) well before being replaced by another contractor.[204] Precision claimed its fees for: (1) drilling work on the initial well; (2) attempting to drill the abandoned second well; (3) attempting to recover equipment from the second well; and (4) drilling the third well, which was needed only because the second was abandoned.[205]

The language of the parties' agreement provided that, for its part, Yangarra "at all times [assumed] all of the risk … and [was] solely liable for … any loss, damage to or destruction of: (ii) Yangarra's equipment [or] (iii) the hole, reservoir or any underground formation … *regardless of the negligence or other fault of Precision or howsoever arising*."[206] Two key clauses in the article of the agreement apportioning risk stated as follows:

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197 *Ibid* at paras 13, 5.
198 *Ibid* at paras 3–4.
199 *Ibid* at para 2.
200 *Ibid* at para 17 (because the proceeding was an application for summary judgment, the Court resolved all conflicts in the evidence by assuming the facts to be as stated by Yangarra).
201 *Ibid.*
202 *Ibid.* If the matter had gone to trial, Precision's case would have been that a warning was given to Yangarra; the Court noted that based on that provision, "if an employee of Yangarra carelessly flicked a burning cigarette into a barrel of flammable liquid, and burnt Precision's multi-million dollar drilling rig to the ground, Precision would bear the loss and could bring no claim against Yangarra" (*ibid* at para 10).
203 *Ibid.*
204 *Ibid.*
205 *Ibid* at para 2.
206 *Ibid* at para 11 [emphasis added] (in a separate provision, Precision agreed to bear the risk to its own surface equipment).

(a) the purpose of [this Article] is to allocate contractually between Precision and Yangarra certain of the risks, responsibilities and potential losses or liabilities associated with the operations and activities involved in drilling a well under a drilling program; and,

(b) such allocation shall prevail in the place and stead of any other allocation of risks, responsibilities, or potential losses or liabilities that might be made on the basis of the negligence or other fault of either party or howsoever arising or any other theory of legal liability and notwithstanding the breach or alleged breach by either party of any provision of the drilling program not included in [this Article].[207]

3. DECISION

The broad issue for the Court was whether the agreement's "clear wording"[208] should be enforced, even though it would yield a result "completely different from a common law scenario,"[209] in which Precision would bear liability for Yangarra's losses.[210] The Court held that it should be. Two "large commercial entities"[211] had entered into an agreement achieving the "bilateral assignment of risk, where each party generally bears the risk of damage to its own assets, rather than having risk allocated on the basis of fault";[212] it was, "[w]ith certain exceptions, … primarily a 'no fault contract.'"[213]

Yangarra submitted that it should be permitted to counterclaim and seek set-off for: (1) the value of its equipment lost downhole; (2) the approximately $2.5 million spent drilling the third well; and (3) the approximately $720,000 cost to Yangarra (not including what Precision charged) for "fishing operations" to recover the equipment lost downhole.[214] The Court held that the contractual language quoted above excluded liability for Precision's equipment.[215] The latter two claims were excluded by a clause that assigned all risk and liability to Yangarra for the cost of "re-drilling a lost or damaged hole, including, without limitation, the cost of fishing operations, regardless of the negligence or other fault of Precision or howsoever arising."[216]

The Court did not accede to other arguments advanced by Yangarra, including that:

- the release language did not cover all theories of liability, such as gross negligence, unjust enrichment, and fraudulent misrepresentation (the Court held that under the agreement, "each party was assuming risk and releasing the other for all fault of the other, excepting only intentional harm";[217] impliedly, while the Court found no evidence of fraud, it accepted that the contractual language was adequate to exclude liability for fraudulent misrepresentation);[218]

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207 *Ibid* at para 36 [emphasis in original].
208 *Ibid* at para 13.
209 *Ibid* at para 12.
210 *Ibid*.
211 *Ibid* at para 15.
212 *Ibid* at para 8.
213 *Ibid*.
214 *Ibid* at paras 22, 28.
215 *Ibid* at paras 21–22.
216 *Ibid* at para 29 [emphasis omitted].
217 *Ibid* at para 37.
218 *Ibid* at paras 34–38.

- there is a presumption that parties do not intend to contract out of liability for gross negligence (the Court held that it was "entirely sensible to contemplate [the parties] releasing each other from claims based on gross negligence"[219] and that in light of the release language, a court could not presume that it was not intended to encompass liability for gross negligence);[220] and

- the interpretation urged by Precision would lead to interpretive absurdity by rendering Precision's promise to drill in a good and workmanlike manner meaningless (the Court held that Precision's breach had meaningful legal consequences, including entitling Yangarra to remove Precision from the site and to take over operation of Precision's rig).[221]

Lastly, the Court analyzed whether the exculpatory clauses were enforceable in light of the analytical framework prescribed by *Tercon Contractors v. British Columbia (Transportation & Highways)*.[222] The Court held that the exculpatory clause was not unconscionable when made.[223] The Court noted, among other things, that there was no evidence of an imbalance in bargaining power and that the bilateral nature of the no-fault provisions meant that they were not grossly unfair or improvident.[224]

Nor were the exculpatory clauses contrary to public policy. Yangarra submitted that the interpretation the Court adopted would incentivize drilling contractors to cut costs and would place oil and gas workers and the public at risk by encouraging unsafe practices.[225] In the Court's view, this submission amounted to the contention that "the threat of civil litigation based on fault is necessary to advance safe drilling practices."[226] Rejecting Yangarra's submission, the Court reiterated that the contract established adverse consequences for Precision's conduct, that commercial considerations militated toward safe drilling, and that the *Occupational Health and Safety Act*[227] regime promotes safe drilling.[228]

In a subsequent decision, the Court awarded judgment to Precision for interest at the contractual rate of 18 percent commencing 30 days from the rendering of each invoice.[229] The Court recognized that an interest rate of 18 percent included both an incentive to pay and compensation for failure to pay,[230] and noted that charging 18 percent interest on unpaid

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219 *Ibid* at para 43.
220 *Ibid*.
221 *Ibid* at paras 51, 58–59.
222 *Ibid* at paras 82–84, citing *Tercon Contractors Ltd v British Columbia (Transportation & Highways)*, 2010 SCC 4, [2010] 1 SCR 69 [*Tercon*] (the *Tercon* decision mandates consideration of whether the exclusion clause applies in the circumstances; whether it was unconscionable when made; and whether there are public policy reasons for refusing to enforce an otherwise valid exclusion clause).
223 *Precision*, *ibid* at 88–89.
224 *Ibid* at paras 86–88.
225 *Ibid* at para 101.
226 *Ibid* at para 102.
227 RSA 2000, c O-2.
228 *Precision*, *supra* note 196 at paras 103–107.
229 *Precision Drilling Canada Limited Partnership v Yangarra Resources Ltd*, 2015 ABQB 649, 25 Alta LR (6th) 159.
230 *Ibid* at para 24.

goods and services was not only very common, it was also, in this case, industry standard.[231] The Court held that the rate of interest was not extravagant or unconscionable.[232]

4. COMMENTARY

The *Precision* decision reinforces the fact that sophisticated parties who agree to knock-for-knock provisions can expect their agreements to be enforced, although such clauses may not exclude liability for harm intentionally caused.[233] Parties may even be taken to have contracted out of liability for gross negligence despite the absence of express reference to that concept in an exclusion clause. While acknowledging that the comment was speculation, the Court mused that, perhaps, "over time, drilling companies and petroleum companies have found it cheaper in time and money to insure their property and waive subrogated claims against the other, rather than retaining the right to sue the other."[234]

D. NOV ENERFLOW ULC V. ENERFLOW INDUSTRIES INC.[235]

1. BACKGROUND

In *NOV Enerflow*, the Alberta Court of Queen's Bench held that sophisticated parties are entitled to establish survival periods for representations and warranties in commercial contracts, and that enforcing such periods does not contravene the *Limitations Act*.[236]

2. FACTS

Enerflow Industries Inc. (Enerflow) entered into a Purchase and Sale Agreement (PSA) to sell its business to NOV Enerflow ULC (NOV), in which Enerflow made certain representations and warranties.[237] The deal closed on 11 May 2012 (Closing).[238] The PSA included a provision stating that Enerflow Canada would not have any liability in respect of certain representations and warranties unless a claim were made within two years from Closing.[239]

On 3 March 2014, which was within two years of Closing, NOV brought a claim for indemnification under the PSA, alleging breaches of representations and warranties "including but not limited to" those enumerated in its statement of claim.[240]

On 11 August 2015, NOV sought to amend its statement of claim to include allegations of breaches of additional representations and warranties for which NOV had made no claim of indemnification within two years of Closing (the Additional Representations), and to

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231 *Ibid* at paras 24–25.
232 *Ibid* at paras 19, 26 (applying the standard in *HF Clarke Ltd v Thermidaire Corp Ltd* (1974), [1976] 1 SCR 319).
233 *Precision*, *supra* note 196 at para 37.
234 *Ibid* at para 45.
235 2015 ABQB 759, 2015 ABQB 759 (CanLII) [*NOV Enerflow*].
236 *Limitations Act*, *supra* note 126.
237 *NOV Enerflow, supra* note 235 at para 1.
238 *Ibid*.
239 *Ibid* at para 46.
240 *Ibid* at paras 42, 44.

amend its pleadings in respect of breaches it had previously alleged.[241] Enerflow contended that the amendments should not be permitted because the underlying representations and warranties had expired.[242]

3. DECISION

The Court permitted NOV to amend its statement of claim in respect of alleged breaches of representations and warranties of which it had provided notice within two years of Closing.[243] However, the Court held that the amendments alleging breaches of the Additional Representations could not succeed because the Additional Representations had expired.[244] The Court reasoned that "the parties did not intend that all representations and warranties under the [PSA] could survive by virtue of a single blanket allegation that Enerflow Canada breached the representations and warranties under the [PSA] 'including but not limited to' the provisions expressly listed."[245] The Court also noted that if NOV were permitted to prevent the expiry of the PSA's representations and warranties by providing notice of a general allegation of breach, then NOV would have an incentive to bring a claim within the two year period following Closing, whether or not such a claim had any basis.[246]

The Court further held that enforcing expiry dates on representations and warranties does not offend section 7(2) of the *Limitations Act*, which renders invalid any agreement that purports to shorten a limitation period provided by the *Limitations Act*.[247] The Court applied precedent which held that imposing expiry dates on representations and warranties does not violate the *Limitations Act* so long as the expiry date applies to specific representations and warranties rather than to any and all claims.[248] In coming to this conclusion, the Court took into consideration the fact that NOV and Enerflow were sophisticated commercial parties that had negotiated to provide a purely contractual right of indemnity subject to a mutually agreed contractual condition.[249]

NOV also submitted that if a valid claim is made within the limitation period, then section 6 of the *Limitations Act*,[250] which addressees adding claims to proceedings, rather than the terms of the PSA, should govern.[251] The Court held that there was no need to choose. Claims "related to the conduct, transaction or events described in the original pleading"[252] could still be added, but they would have no chance of success to the extent that they relied upon expired representations and warranties.[253]

241 *Ibid* at para 1.
242 *Ibid* at para 4.
243 *Ibid* at para 2.
244 *Ibid*.
245 *Ibid* at para 54.
246 *Ibid*.
247 *Limitations Act*, *supra* note 126, s 7(2); *ibid* at para 57.
248 *NOV Enerflow*, *ibid* at para 57, citing *Edmonton (City) v TransAlta Energy Marketing Corp et al*, 2008 ABQB 426, 441 AR 228.
249 *NOV Enerflow*, *ibid* at para 59, citing *NFC Acquisition LP v Centennial 2000 Inc*, 2011 ONCA 43, 78 BLR (4th) 11 at para 4.
250 *Limitations Act*, *supra* note 126, s 6.
251 *NOV Enerflow*, *supra* note 235 at para 61.
252 *Ibid*.
253 *Ibid*.

4. COMMENTARY

NOV Enerflow affirms that where sophisticated commercial parties have negotiated the duration for which their representations and warranties will survive after the closing of a transaction, such survival periods will not offend the *Limitations Act*. It also demonstrates that a general notice of breach of representations and warranties without reasonable particulars of the breaches alleged will likely not be considered sufficient notice for preserving a claim in the face of expiring representations and warranties.

E. *SCOTTISH POWER UK PLC V. BP EXPLORATION OPERATING COMPANY LTD.*[254]

1. BACKGROUND

This decision of the High Court of Justice (Commercial Court) of England and Wales concerns five preliminary issues that arose under four long-term agreements for the sale and purchase of natural gas (the Agreements). The defendant gas sellers (the Owners) shut-in production of the Andrew field, a North Sea gas field, for over three and a half years to permit modification of the field's platform and facilities so that they could handle production from the nearby Kinnoull Field, which had considerable common, although not identical, ownership.[255] During this turndown, the gas purchaser (Scottish Power) received no deliveries, but made nominations as it was required to do.[256] The dispute was about the contractual consequences of the shut-in.

2. FACTS

The Owners accepted that (except for the first 11 days of the turndown, which were agreed to constitute a *force majeure* event) their failure to deliver gas to Scottish Power breached the Agreements.[257] The central issue was whether Scottish Power could claim for damages at common law, including the difference between the contractual price for gas and the price of the make-up gas it purchased on the market, or whether its exclusive remedy was a compensation mechanism provided for in the Agreements, "involving the supply of gas at a reduced price after deliveries resume"[258] (Default Gas). Scottish Power contended that not only had the Owners breached an obligation to deliver gas (for which, all parties agreed, the sole remedy was Default Gas), but they had also breached a separate obligation (article 7.1) to operate the facilities in accordance with the standard of the Reasonable and Prudent Operator (RPO).[259] Article 7.1 provided that the Seller "will, in accordance with the [RPO standard], provide, install, repair, maintain and operate those Seller's Facilities which are (in the opinion of the Seller and the other Sellers) necessary to produce and deliver at the

[254] [2015] EWHC 2658, [2016] 1 All ER 536 (Comm) (HCJ) [*Scottish Power*].
[255] *Ibid* at paras 1-2.
[256] *Ibid* at paras 37, 41.
[257] *Ibid* at para 3.
[258] *Ibid*.
[259] *Ibid* at paras 57–58.

relevant times the quantities of Natural Gas from the Andrew Field which are required … to be delivered to the Buyer at the Delivery Point."[260]

The first two issues concerned whether the failure to operate the facilities, without more, amounted to a breach, and if the RPO standard was relevant to this analysis, whether the Owner had breached article 7.1.[261] The third issue was whether the only remedy for breach of article 7.1 was Default Gas, since the result of the breach was a non-delivery of gas.[262] The fourth issue was whether the Owners' liability was limited by a clause of the Agreements excluding liability for "loss of use" and "loss of profit."[263] The fifth issue was whether the Owners could rely on *force majeure* as a defence to liability despite having failed to submit one of the reports required by the governing clause; while they had given an initial notice and an interim report after five days, they had not submitted a detailed report after 20 days.[264]

3. DECISION

The Court concluded that the Owners' failure to operate the facilities to produce gas was a breach of Article 7.1 only if it was shown to have involved a failure to comply with the RPO standard.[265] The Court went on to hold that article 7.1 had been breached because the RPO standard had not been met.[266] This is perhaps the most useful and interesting part of the Court's well-written reasons. The RPO standard in this agreement was in two parts. The first part of the test required that the Owners seek to perform their contractual obligations in good faith.[267] It was apparent that the Owners were not doing so when they shut down the facilities. The Court held that "a party cannot comply with the RPO standard if it is not seeking to perform its contractual obligations, which [the Owners] were not seeking to do."[268]

The Owners also argued that they met the RPO standard because the work being done would afford third party access to the Andrew field infrastructure, consistent with legislation and industry standards.[269] The Court found that most of the work being done fell outside the scope of statutory powers that could be exercised to afford third party access.[270] It was therefore unnecessary to consider the second leg of the RPO test, but nonetheless, the reasons are interesting. The second leg goes to whether the operator exercised the skill, "expected from a skilled and experienced operator engaged in the same type of undertaking under the same or similar circumstances and conditions."[271] It was clear that the Owners expected significant financial gain from this investment. That was their motivation and, among other

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[260] *Ibid* at paras 54–55. An RPO was defined as

> a Person seeking in good faith to perform its contractual obligations and, in so doing and in the general conduct of its undertaking, exercising that degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced operator engaged in the same type of undertaking under the same or similar circumstances and conditions (*ibid* at para 55).

[261] *Ibid* at para 46.
[262] *Ibid*.
[263] *Ibid*.
[264] *Ibid*.
[265] *Ibid* at para 53.
[266] *Ibid* at para 120.
[267] *Ibid* at para 75.
[268] *Ibid* at para 67.
[269] *Ibid* at para 34 (specifically, an industry "Code of Practice on Access to Upstream Oil and Gas Infrastructure on the UK Continental Shelf").
[270] *Ibid* at para 96.
[271] *Ibid* at para 75.

things, they received compensation from the Kinnoull owners for the losses resulting from the Andrew shut down.[272] Interestingly, the Court stated that the decision that the Owners made in the circumstances met the second leg of the RPO test.[273]

The third issue was whether Default Gas was the sole remedy for the breach of the RPO standard in Article 7.1. The decision is highly dependent on the precise wording of the Agreements. What is important for our purposes is that the obligation to deliver gas and the obligation to meet the RPO standard are separate. While failure to meet the standard may result in an underdelivery, underdelivery is not a necessary element. Similarly, an underdelivery may not involve a failure to meet the RPO standard.[274] Nonetheless, the Court held that the Default Gas remedy (established by article 16)[275] was the sole remedy available where a breach of article 7.1 caused loss by way of an "underdelivery,"[276] that is, in respect of the shortfall relative to Scottish Power's nominations. However, Scottish Power may also be entitled to damages in respect of the additional gas that it can show it would have properly nominated had the Andrew field been producing.[277]

Fourth, the Court held that a claim for damages would not be excluded by a clause limiting liability for "loss of use" or "loss of production."[278] The only "expected benefit" Scottish Power claimed to have lost was that of "buying the gas which should have been delivered … at a price below the market price," which did not fall within the exclusion.[279] Scottish Power did not claim damages for its lost revenue or profits for these breaches.

On the fifth issue, the Court held that the Owners' failure to submit a detailed report twenty days after invoking *force majeure* did not disentitle them to relief.[280] The Court held that reasonable parties who intended for the reporting requirements to constitute conditions precedent or subsequent to relief would have said so expressly.[281] The requirement to report was an obligation, the breach of which could presumably be compensated by damages, which was the only remedy available.

4. COMMENTARY

This decision is of interest for its discussion of the principles of contractual interpretation and its meticulous attention to the terms of a take-or-pay contract, both regarding the operator's obligations in light of the RPO standard, and the interpretation of a remedy for failure to supply nominated amounts of product. Scottish Power has been granted permission

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[272] *Ibid* at para 89.
[273] *Ibid* at para 90.
[274] *Ibid* at paras 140, 142, 173.
[275] *Ibid* at para 129. Article 16.6 provided that the Default Gas remedy

> shall be in full satisfaction and discharge of all rights, remedies and claims howsoever arising whether in contract or in tort or otherwise in law on the part of the Buyer against the Seller in respect of underdeliveries by the Seller under this Agreement, and save for [Article 16 remedies and claims arising pursuant thereto], the Buyer shall have no right or remedy and shall not be entitled to make any claims in respect of any such underdelivery" (*ibid* at para 129).

[276] *Ibid* at para 131 (in summary, a failure to deliver an amount of gas properly nominated and of which the Buyer, as defined in the Agreements, was able to accept delivery).
[277] *Ibid* at para 158.
[278] *Ibid* at para 182.
[279] *Ibid*.
[280] *Ibid* at para 205.
[281] *Ibid* at para 223.

to appeal in relation to the Default Gas issue.[282] A potentially controversial aspect of the decision is the Court's conclusion, in *obiter*, that if the Owners had been able to meet the first limb of the RPO standard ("[seeking] in good faith to perform … contractual obligations"),[283] then they would not have needed to cite legislation or industry standards to justify the turndown. The Court held that to ignore the "substantial financial rewards" the Owners stood to gain from the work performed during shut-in would "divorce the RPO standard from commercial reality and render it totally artificial."[284]

F. *SemCAMS ULC v. Blaze Energy Ltd.*[285]

1. Background

In a decision upheld by the Alberta Court of Appeal, the Alberta Court of Queen's Bench in *SemCAMS (Motion)* held that an operator of gas transportation and processing facilities was entitled to immediate payment of invoices based on estimated amounts, regardless of whether there was a dispute over the amounts owed.[286] The producer disputing the amounts did not have the right to withhold payment pending the outcome of a trial over the correct amounts owing. The producer was required to pay the invoiced amounts, but was free to pursue an audit under the terms of the relevant agreements and subsequently bring a claim for any resulting adjustments.[287]

2. Facts

SemCAMS ULC (SemCAMS) operated certain gas transportation and processing facilities and contracted with a number of producers, including Blaze Energy Ltd. (Blaze), under various gas processing, transportation, and operating agreements.[288] Under such gas processing, transportation, and operating agreements with Blaze (the Agreements), SemCAMS issued monthly invoices based on estimated costs and production volumes.[289] These estimates were adjusted annually based on actual throughput volumes.[290]

Between July 2012 and April 2013, SemCAMS issued 11 invoices to Blaze under the Agreements, totalling over $5 million.[291] Blaze contested the amounts owing, refused to pay the invoiced amounts, and triggered an audit under the terms of the Agreements.[292] SemCAMS brought an action against Blaze for payment of the invoiced amounts and then brought an application for summary judgment.

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282 Herbert Smith Freehills LLP, "High Court Rules on the Interpretation of Long Term Gas Sales Agreements and the Contractual Consequences of a Failure to Supply Natural Gas from an Oil and Gas Field in the North Sea" (1 October 2015), *Lexology*, online: <www.lexology.com/library/detail.aspx?g=1c250c77-2d2c-4116-ab3b-351ef8f38fc9>.

283 *Ibid* at para 75.

284 *Ibid* at paras 89, 118.

285 2015 ABQB 218, 40 BLR (5th) 271 [*SemCAMS* (Motion)], aff'd 2016 ABCA 113, 2016 ABCA 113 (CanLII) [*SemCAMS*].

286 *SemCAMS* (Motion), *ibid* at para 47.

287 *Ibid* at para 51.

288 *Ibid* at para 1.

289 *Ibid* at para 8.

290 *Ibid*.

291 *Ibid* at para 9.

292 *Ibid* at para 14.

Blaze argued that it was not required to pay SemCAMS until the amount ultimately owing to SemCAMS had been determined at trial.[293] SemCAMS argued that the Agreements required Blaze to pay the estimated amounts immediately, subject to adjustment if the estimated amount was later found to be different than the actual amount owing.[294] In support of its application for summary judgment, SemCAMS submitted that it would be unworkable in the industry if producers could withhold payment from operators by triggering audits.[295] Blaze contended that SemCAMS' interpretation was commercially absurd because it suggested Blaze would be obligated to pay whatever amount SemCAMS invoiced.[296]

3. DECISION

The Alberta Court of Queen's Bench held that SemCAMS was entitled to summary judgment for the invoiced amounts.[297] The Court was satisfied that the parties had intended the estimated amounts invoiced by SemCAMS would be immediately due and payable by Blaze.[298] The Court held that if there was a dispute, the expectation under the Agreements was that an audit would be conducted, but that Blaze was not entitled to withhold payment pending resolution of the dispute.[299] This was confirmed by a plain reading of the terms of the Agreements. Some of the Agreements expressly stated that Blaze could not withhold any portion of payment even in the event of dispute; others stated that SemCAMS could maintain an action for unpaid amounts as if Blaze's payment obligation were a liquidated demand without right of set-off or counterclaim.[300]

The motions judge rejected Blaze's argument that this result was commercially absurd. Rather, as a matter of business efficacy, the operator needed to be able to count on a reliable cash flow and therefore the parties had allocated the risk of inaccurate monthly invoices to the producer, which the Court found was not an unreasonable allocation of risk.[301]

4. COMMENTARY

The arrangement between SemCAMS and Blaze is an example of the "pay first, dispute later" structure that is common in the oil and gas industry. This structure serves to protect operators' legitimate cash flow needs where operators make expenditures on behalf of a number of producers. Under most commercial agreements, amounts must be proven owed and not simply billed before a customer is required to pay.[302] However, as this case demonstrates, it is possible to deviate from this position by contract.

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[293] *Ibid* at para 39.
[294] *Ibid* at para 40.
[295] *Ibid* at para 39.
[296] *Ibid* at para 40.
[297] *Ibid* at para 51.
[298] *Ibid* at para 47.
[299] *Ibid*.
[300] *Ibid* at para 13.
[301] *Ibid* at para 48.
[302] *Ibid* at para 49.

The Court left open the question of whether a producer would be required to pay invoiced amounts in cases where there was evidence of fraud or other misfeasance, finding that in this case the invoices had been prepared in good faith.[303]

G. *APACHE CANADA LTD. V. TRANSALTA COGENERATION LP*[304]

1. BACKGROUND AND FACTS

In *Apache*, the Alberta Court of Queen's Bench summarily dismissed Apache Canada Ltd.'s (Apache) application alleging breach of a long-term natural gas supply agreement (the Agreement). The Agreement was for a term of 15 years, and provided that Apache would supply natural gas to TransAlta Cogeneration, LP, and TransAlta Cogeneration Ltd. (collectively, TransAlta) at a fixed price (subject to escalation) for use in a project facility in Windsor, Ontario.[305] It also contained a right for Apache to buy back "any volumes of [g]as in excess of those required for the [p]roject [f]acility"[306] which are not required by TransAlta at the same price for which it had sold such gas to TransAlta (the ROFR).[307]

Originally, TransAlta transported Apache's gas to its final destination in Windsor, Ontario using the TransCanada Pipelines Limited (TCPL) pipeline system.[308] The cost of using the TCPL pipeline increased over time and TransAlta began employing "synthetic transportation,"[309] whereby it sold the gas received from Apache in Alberta to third parties, and through a subsidiary acquired replacement gas from another supplier and transported it to the facility in Windsor on Apache's behalf without using the TCPL pipeline.[310] Effectively, TransAlta used Apache's gas as a commodity to exchange for other gas that ultimately arrived at the Windsor facility through a non-TCPL route.[311]

Apache claimed that TransAlta had triggered Apache's ROFR by not transporting Apache's specific gas molecules to the delivery point and instead engaging in synthetic transportation of its gas, and by not transporting the gas it received from Apache via the pipelines contemplated in the Agreement.[312] At the time that the Agreement was entered into, natural gas prices in Alberta were low, but by the time the dispute arose the market had significantly improved and Apache claimed that if it had had the opportunity to exercise the ROFR, it could have sold the gas on the open market and obtained over $8 million in profits.[313]

Apache argued that the Agreement required physical transport of Apache's specific gas, and that the Agreement required the gas to be transported via the TCPL pipeline system.[314]

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303 *Ibid* at para 50.
304 2015 ABQB 650, 2015 ABQB 650 (CanLII) [*Apache*].
305 *Ibid* at para 2.
306 *Ibid* at para 29.
307 *Ibid* at para 11.
308 *Ibid* at para 6.
309 *Ibid*.
310 *Ibid* at para 8.
311 *Ibid*.
312 *Ibid* at paras 15–17.
313 *Ibid* at paras 5, 13.
314 *Ibid* at paras 10–11.

TransAlta countered that although it had used the TCPL pipeline system at the outset of the Agreement's term, it made no firm commitment under the Agreement to use that specific pipeline system, and that there was no express requirement that it transport the specific gas molecules it acquired from Apache to the Windsor facility so long as it delivered natural gas to that facility in the quantity and in accordance with the specifications required by the Agreement.[315] TransAlta outlined that, similar to water, money, or electricity, natural gas is a fungible commodity, and that it is well-known within the industry that the specific gas molecules delivered to a pipeline system by a shipper will not be the same as the gas molecules received on behalf of that shipper at the delivery point.[316] Unlike oil, which uses a batching system to ensure that a party's specific oil molecules are maintained throughout a shipment, a shipper of natural gas never receives the same natural gas molecules at the delivery point.[317]

In respect of the ROFR, Apache noted that TransAlta entered into eight purchase and sale agreements using synthetic transportation, and argued that each such purchase and sale was prohibited by the Agreement and triggered Apache's ROFR.[318] In response, TransAlta characterized its synthetic transportation process as a series of exchanges, rather than sales, and urged the Court to view its activities as a means of transporting a fungible product.[319] Ultimately, TransAlta needed the same volume and specifications of gas that it received from Apache at its Windsor facility, and thus the ROFR was not triggered.[320]

2. DECISION

The Court noted that although the parties presented a significant amount of evidence, the issue was ultimately one of contractual interpretation, and that the surrounding factual evidence was to be used for understanding the general circumstances.[321] Given that the relevant facts were not in dispute, the claim was a proper one for summary judgment — especially in light of the "entire agreement" clause contained in the Agreement.[322]

The Court held that there was no breach of the Agreement based on a failure by TransAlta to transport Apache's gas via the TCPL pipeline system because the Agreement did not contain an express or implied covenant that TransAlta would do so.[323] The Court noted that provisions of an agreement are not to be read in isolation, but rather agreements are to be read as a whole.[324] Based on a reading of the Agreement in its entirety, the Court held that although TransAlta was responsible for the transport of the gas, the Agreement did not contain an express covenant that TransAlta was required to use the TCPL pipelines to do so.[325]

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315 *Ibid* at paras 19, 27.
316 *Ibid* at paras 17–18.
317 *Ibid* at para 16.
318 *Ibid* at para 33.
319 *Ibid* at paras 58–59.
320 *Ibid* at para 60.
321 *Ibid* at para 20.
322 *Ibid* at paras 21–22.
323 *Ibid* at paras 75–79.
324 *Ibid* at para 78.
325 *Ibid* at para 79.

On the subject of the ROFR, the Court noted that it was only triggered where "any volumes of [g]as in excess of those required for the Project Facility are *not required* by [TransAlta] or its Affiliates."[326] In this case, Apache conceded that TransAlta required all of the gas it received from Apache for use at the project facility in Windsor.[327] Unlike most contractual rights of first refusal, Apache's ROFR was not a prohibition on sale; it applied only in the event that TransAlta did not require the gas at its Windsor facility.[328] There were no amounts of gas delivered by Apache that TransAlta did not ultimately use at the facility; accordingly, Apache's ROFR was not triggered.[329]

3. COMMENTARY

The *Apache* decision confirms a well-known industry principle that, given the fungible nature of natural gas, one cannot expect to receive the exact natural gas molecules that it ships on a pipeline or through another mode of transportation. Furthermore, it clarifies that right of first refusal provisions will be interpreted based on the actual wording of the agreement and the intentions of the parties. Based on a plain reading of the words of the Agreement, the existence of purchase and sale transactions was not a critical element in determining whether or not the ROFR applied.

H. *CAVENDISH SQUARE HOLDING BV V. MAKDESSI*; *PARKINGEYE LTD. V. BEAVIS*[330]

1. BACKGROUND

In *Cavendish* and *ParkingEye*, the Supreme Court of the United Kingdom redefined the penalty rule for determining whether a contractual provision amounts to a liquidated damages clause or a penalty clause.

2. FACTS

This decision involves appeals in two separate cases, *Cavendish* and *ParkingEye*. In *Cavendish*, Mr. Makdessi had agreed to sell some of his shares in the parent company of the marketing business in which he held a significant interest, to Cavendish Square Holding BV (Cavendish).[331] A large portion of the purchase price of the shares reflected the goodwill associated with the business and Makdessi's involvement in it.[332] Payment was to be made in installments, and the agreement provided that if Makdessi breached certain restrictive covenants, he would not be entitled to receive the final two installments and Cavendish could exercise an option to purchase all of his remaining shares at a price equal to their "Net Asset Value" (thereby excluding the goodwill value).[333] Makdessi breached a restrictive covenant

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326 *Ibid* at para 84 [emphasis added].
327 *Ibid* at para 85.
328 *Ibid* at paras 82, 84-85.
329 *Ibid* at para 85.
330 [2015] UKSC 67, [2015] 3 WLR 1373 [*Cavendish*]; [*ParkingEye*].
331 *Ibid* at para 46.
332 *Ibid* at para 66.
333 *Ibid* at para 68.

by engaging in a competing business and was forced to sell his shares to Cavendish at a discount of up to approximately US$44,000,000.[334]

In *ParkingEye*, Mr. Beavis overstayed a car park's two hour limit by nearly one hour and received a fine of £85.[335] This policy was clearly marked by signs throughout the car park.[336] Beavis argued that the ticket was unenforceable at common law as it amounted to a penalty.[337]

3. DECISION

The majority of the Court set out a new formulation of the test for determining whether a contractual provision amounts to a penalty: "whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation."[338] The clause does not need to be a genuine pre-estimation of damages, as the true issue is whether or not the clause constitutes punishment.[339]

In *Cavendish*, the Court found that the clauses imposing consequences for the breach of covenants were not penalties and were enforceable. The Court emphasized the legitimate interests of Cavendish in enforcing these clauses against Makdessi, even if the damages had no approximate relationship to the measure of Cavendish's actual losses.[340]

Similarly, in *ParkingEye*, the Court found that the fine was not a penalty and was enforceable based on the legitimate interests of the car park, namely, the efficient management of parking spaces and deterrence of overstaying, as well as the fact that the £85 fine was neither extravagant nor unconscionable.[341]

4. COMMENTARY

Despite noting that "[t]he penalty rule is an interference with freedom of contract"[342] and that the conditions that gave rise to its creation may no longer be relevant, the Court was not prepared to abandon the penalty rule entirely.[343] The reformulation of the penalty rule in the UK expands a court's examination to the broader commercial context of a transaction in determining whether the obligation imposed under a clause is in proportion to the legitimate interest of the innocent party.

In Canada, the penalty rule applies and typically follows the four tests set out by Lord Dunedin in *Dunlop Pneumatic Tyre Company Limited v. New Garage and Motor Company*

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334 *Ibid* at para 67.
335 *Ibid* at para 92.
336 *Ibid* at para 100.
337 *Ibid* at para 128.
338 *Ibid* at para 32.
339 *Ibid* at para 31.
340 *Ibid* at para 75.
341 *Ibid* at paras 98–100.
342 *Ibid* at para 33.
343 *Ibid* at para 34.

Limited,[344] which the Court in this case noted would still be adequate in the case of straightforward damages clauses where the interest of the innocent party will rarely extend beyond compensation for the breach.[345] Although *Cavendish* and *ParkingEye* is a decision from the UK Supreme Court, it could influence Canadian jurisprudence on the penalty rule in time.

IV. EMPLOYMENT AND LABOUR

A. *BAHRAMI V. AGS FLEXITALLIC INC.*[346]

1. BACKGROUND

In *Bahrami*, the Alberta Court of Queen's Bench addressed the divergence in Canadian case law regarding the relevance of the character of a dismissed employee's employment, which has traditionally been a factor used in determining the reasonable notice period to which an employee dismissed without notice or cause is entitled.

2. FACTS

Farhad Bahrami was hired by AGS Flexitallic Inc. (AGS) as Vice President, Finance.[347] Bahrami was not employed elsewhere when he was hired, but he did relocate to accept the position with AGS.[348] Eight-and-a-half months after he was hired, Bahrami's employment was terminated, without notice and without cause.[349] Five months later, Bahrami found comparable, but slightly lower paying, employment.[350] He then brought a claim against AGS for wrongful termination, seeking, among other things, damages in lieu of notice covering a period of 12 months, and brought an application for summary judgment.[351]

The parties agreed that Bahrami was entitled to pay in lieu of reasonable notice, but disputed the amount owed. Bahrami characterized his job as executive level employment and asserted that despite the short period of employment, he was entitled to 10 or 12 months' notice.[352] AGS claimed that despite Bahrami's job title, his status in the company was not at the executive level, and that he was therefore only entitled to three months' notice.[353]

3. DECISION

The Court reviewed the well-established factors used to calculate the reasonable notice period for an employee terminated without cause, being those articulated in *Bardal v. The Globe & Mail Ltd.*:[354] "the character of the employment, the length of service of the servant,

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344 [1915] AC 79 (HL (Eng)).
345 *Cavendish*; *ParkingEye*, *supra* note 330 at para 32.
346 2015 ABQB 536, [2016] 1 WWR 567 [*Bahrami*].
347 *Ibid* at para 3.
348 *Ibid.*
349 *Ibid* at para 6.
350 *Ibid.*
351 *Ibid* at paras 1, 7.
352 *Ibid* at para 9.
353 *Ibid* at para 10.
354 (1960), 24 DLR (2d) 140 (SCC) [*Bardal*].

the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant."[355] The Supreme Court also noted that these factors are not exhaustive, and that one factor should not be given more weight than another unless the case is outside the norm.[356]

A focal point of the Court's analysis was the general rule that employees holding more senior positions are entitled to be given more notice.[357] Factors that indicate an employee's seniority include the employee's job title, position in the hierarchy of a company, supervisory or management responsibilities, degree of independence and responsibility, and the specialized knowledge required for the position.[358]

The Court observed growing divergence in Canadian case law regarding how much weight the character of employment factor should be given. For example, in *Cronk v. Canadian General Insurance Co.*,[359] the Ontario Court of Appeal overturned a decision on the basis that it "incorrectly rejected the long-held principle that more senior employees are entitled to a longer notice period because of the difficulty they have in finding alternative employment."[360] *Cronk* has often been followed. Another line of authorities, stemming from the New Brunswick Court of Appeal's decision in *Bramble v. Medis Health and Pharmaceutical Services Inc.*,[361] cautions that that there is "no longer any juristic basis for the application, as a matter of law, of character of employment simpliciter as a determining factor."[362] The *Bramble* line of cases holds that determining notice period based on "the traditional approach, to the extent that it includes a consideration of character of employment simpliciter, is antithetical to the law's ultimate goal, namely egalitarian justice."[363] In a previous Alberta case, the Alberta Court of Queen's Bench declined to resolve any disagreement between the two lines of authority.[364]

The Court in *Bahrami* found the *Bramble* line of authorities persuasive, expressing reluctance to take judicial notice of the prospects of employment of an executive level employee and a non-executive level employee on the facts of the case.[365] The Ontario Court of Appeal has now twice "relied on the reasoning in *Bramble* … for the proposition that, while no single *Bardal* factor should be given disproportionate weight, the character of a dismissed worker's employment is today a factor of "declining importance."[366] Ultimately, the Court in *Bahrami* decided that the reasonable notice period in the circumstances was six months.[367]

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355 *Bahrami*, *supra* note 346 at para 19, citing *Machtinger v HOJ Industries Ltd*, [1992] 1 SCR 986 at 998–99.
356 *Bahrami*, *ibid* at para 20.
357 *Ibid* at para 21.
358 *Ibid.*
359 (1960), 128 DLR (4th) 147 (Ont CA) [*Cronk*].
360 *Bahrami*, *supra* note 346 at para 23, citing *Cronk*, *ibid* at para 24.
361 (1999), 175 DLR (4th) 385 (NBCA) [*Bramble*].
362 *Bahrami*, *supra* note 346 at para 25, citing *Bramble*, *ibid* at paras 69–70.
363 *Bramble*, *ibid* at para 70.
364 *Tanton v Crane Canada Inc,* 2000 ABQB 837, 278 AR 137 at paras 158–63.
365 *Bahrami, supra* note 346 at para 33.
366 *Ibid* at para 27.
367 *Ibid* at para 49.

4. COMMENTARY

Bahrami indicates that the "character of employment" factor may be declining in importance in determining a reasonable notice period, and suggests that employees occupying executive positions may not be entitled to longer notice periods than employees in non-executive positions based on their positions alone. However, *Bahrami* was a decision on a summary judgment application, meaning the parties may have adduced less evidence than would have been present in a full trial, which may limit the future applicability of the decision.

B. *POTTER V. NEW BRUNSWICK LEGAL AID SERVICES COMMISSION*[368]

1. BACKGROUND

In *Potter*, the Supreme Court of Canada's unanimous judgment clarified the test for constructive dismissal.

2. FACTS

Midway through David Potter's appointment as the Executive Director of the New Brunswick Legal Aid Services Commission (the Commission), he and the Commission began to negotiate a buyout of his employment contract.[369] Before they concluded negotiations, Potter went on medical leave.[370]

During Potter's leave, the Commission's Board of Directors asked the Minister of Justice to terminate Potter's employment for cause because the negotiations for the buyout of his contract had not yet concluded.[371] The Commission sent a letter to Potter's counsel advising that Potter should not return to work until further notice, without further reasons.[372] Potter's counsel asked for clarification of the Commission's instructions, to which the Commission's counsel responded: "[Mr. Potter] is not to return to work until further notice."[373] Accordingly, Potter did not return to work following his sick leave, and the Commission delegated Potter's duties to another individual.[374] Eight weeks later, Potter commenced an action for constructive dismissal.[375]

Both the New Brunswick Court of Queen's Bench and Court of Appeal held that Potter's suspension with pay did not amount to constructive dismissal, as it did not "substantially [alter] the essential terms of the employee's contract of employment."[376]

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368 2015 SCC 10, [2015] 1 SCR 500 [*Potter*].
369 *Ibid* at para 7.
370 *Ibid* at para 6.
371 *Ibid* at para 9.
372 *Ibid* at paras 8–10.
373 *Ibid* at para 12.
374 *Ibid* at para 13.
375 *Ibid* at para 14.
376 *Ibid* at para 163, citing *Potter v New Brunswick (Legal Aid Services Commission),* 2013 NBCA 27, 6 CCEL (4th) 1 at para 83.

3. DECISION

The Supreme Court of Canada overturned the lower courts' decisions and took the opportunity to resolve a "lack of clarity in the law"[377] of constructive dismissal. The Court noted that constructive dismissal can take two forms: (1) "a single unilateral act that breaches an essential term of the contract"; or (2) "a series of acts that, taken together, show that the employer no longer intended to be bound by the contract."[378] The Supreme Court determined that Potter's case involved a single unilateral act by the Commission.[379]

A single unilateral action will amount to breach of contract where the unilateral change made by the employer breaches a specific term of the employment contract, unless the employer has express or implied authority to make the change or the employee consents or acquiesces to the change.[380] If the court determines that there was a breach of the employment contract, it must then ascertain whether that breach could reasonably be perceived as having substantially altered an essential term of the employment contract.[381] Constructive dismissal is found if a reasonable person in the employee's situation would consider that the essential terms of the employment contract were substantially changed by the breach.[382]

The employee holds the burden of establishing constructive dismissal, except in cases involving an administrative suspension, where the burden shifts to the employer to justify the suspension.[383] If the employer fails to justify the suspension, a breach is established and the burden shifts back to the employee.[384]

The Supreme Court determined that nothing in the *Legal Aid Act*,[385] which governed Potter's employment, gave the Commission the authority to suspend Potter for administrative reasons.[386] Even if the Commission had the authority to relieve Potter of his duties, such authority was subject to business justification.[387] The Commission was also prohibited from asserting it had acted pursuant to an implied term of the employment agreement because it failed to establish that the suspension was reasonable or justified.[388]

Potter was indefinitely suspended without reasons, and the Supreme Court found that his perception that the suspension was a substantial change to his employment agreement was reasonable.[389] Justice Cromwell and Chief Justice McLachlin concurred with the Supreme Court's analysis, but took a broader approach when they articulated that constructive

[377] *Potter*, *supra* note 368 at para 156.
[378] *Ibid* at para 43.
[379] *Ibid* at para 46.
[380] *Ibid* at para 44.
[381] *Ibid* at para 45.
[382] *Ibid*.
[383] *Ibid* at para 41.
[384] *Ibid*.
[385] RSNB 1973, c L-2.
[386] *Potter*, *supra* note 368 at paras 58–59.
[387] *Ibid* at para 86.
[388] *Ibid* at para 99.
[389] *Ibid* at para 105.

dismissal may also be established by conduct that demonstrates an intention to no longer be bound by the essential terms of the employment contract.[390]

4. COMMENTARY

Employers should review their employment contracts to ensure that they provide sufficient latitude to make justified operational and staffing decisions. Before revising existing employment contracts, employers should ensure that any proposed changes are not unilateral. If a change is unilateral, it should not be a "substantial change" to the contract. Moreover, employers should clearly communicate any reasons for employee suspensions and maintain communication with suspended employees throughout the suspension.

V. ENVIRONMENTAL LAW

A. *J.I. PROPERTIES INC. V. PPG ARCHITECTURAL COATINGS CANADA INC.*[391]

1. BACKGROUND

This British Columbia Court of Appeal decision dealt with issues related to remediation costs pursuant to the province's *Environmental Management Act*.[392] The Court addressed whether ICI Canada Inc. (ICI), a previous landowner and polluter of the subject land, should be exempt from paying remediation costs pursuant to the *EMA*.[393] The Court also addressed whether, in the alternative, remediation costs should be allocated to the current landowner based on a "principle of liability"[394] that was said to underpin section 46(1)(m) of the *EMA*, which addresses the persons who are *not* responsible for remediation of a contaminated site.[395]

2. FACTS

The subject land (James Island) was previously owned by ICI, who had used it to manufacture and store explosives.[396] While operating its explosive manufacturing facility in the 1980s, ICI remediated certain parts of James Island for contaminants such as lead and mercury.[397] Environmental legislation at the time did not establish environmental standards for the remediation of contaminated land. Instead, the Ministry of Environment and Parks (the Ministry) and ICI agreed upon the applicable criteria to be used by ICI in their remediation efforts.[398] Once satisfied with the remediation efforts, the Ministry provided ICI with a "comfort letter"[399] indicating that the established criteria had been met and

390 *Ibid* at para 164.
391 2015 BCCA 472, 81 BCLR (5th) 326 [*JI*].
392 SBC 2003, c 53 [*EMA*].
393 *JI*, *supra* note 391 at para 41.
394 *Ibid* at para 56.
395 *EMA*, *supra* note 392, s 46(1)(m).
396 *JI*, *supra* note 391 at para 12.
397 *Ibid* at para 14.
398 *Ibid* at para 15.
399 *Ibid* at para 45.

acknowledging that ICI registered a restrictive covenant on the land outlining the possibility of soil contamination.[400]

In 1994, J. I. Properties Inc. (JIP) acquired James Island with knowledge of the restrictive covenant, ICI's previous remediation efforts, and prior usage of the land.[401] The *EMA*, a new statutory regime concerning waste management, had come into force in the intervening years. The *EMA* sets out specific standards for remediation efforts in relation to contaminated sites.[402]

JIP conducted additional remediation efforts on certain parts of James Island and obtained a certificate of compliance from the Ministry pursuant to the *EMA*.[403] These efforts cost JIP $5.3 million, over half of which went towards areas that had not been remediated by ICI.[404] JIP sought recovery of its remediation costs from ICI under section 47 of the *EMA*.[405] ICI sought an exemption from liability pursuant to section 46(1)(m) of the *EMA* which "exempts a former owner from liability for remediation costs where a former owner has a certificate of compliance."[406] ICI contended that the comfort letter it received from the Minister qualified as a "certificate of compliance" for the purposes of this section.[407]

The trial judge held that the comfort letter provided to ICI by the Ministry prior to the enactment of the *EMA* was not equivalent to a certificate of compliance under section 46(1)(m) of the *EMA*, and that accordingly ICI was liable for JIP's remediation costs.[408] On the issue of whether the remediation costs could be apportioned between the parties, the trial judge held that no evidence was provided to support an apportionment.[409] ICI appealed.

3. DECISION

The Court of Appeal primarily addressed whether ICI was liable under the *EMA* for any or all of JIP's remediation costs despite ICI's previous remediation of the land to standards acceptable to the Ministry at that time.

The Court of Appeal agreed with the trial judge's finding that the comfort letter did not meet the specific definition of a "certificate of compliance" under the *EMA*.[410] The Court reviewed the statutory history of the term "certificate of compliance" and noted that such a certificate may be issued if a site has been remediated in accordance with standards prescribed in relevant regulations.[411] The comfort letter ICI obtained was issued based on standards set by ICI and the Ministry at the time, and not on standards prescribed by the *Contaminated Sites Regulation*.[412] Indeed, neither the *CSR* nor any other prescribed standards

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400 *Ibid* at paras 20, 45.
401 *Ibid* at para 21.
402 *Ibid* at para 22.
403 *Ibid* at paras 24, 26.
404 *Ibid* at para 27.
405 *Ibid* at para 28.
406 *Ibid* at para 3.
407 *Ibid* at para 42.
408 *Ibid* at para 3.
409 *Ibid* at para 4.
410 *Ibid* at para 46.
411 *Ibid* at paras 47–50.
412 BC Reg 375/96 [*CSR*].

existed during ICI's remediation period in the 1980s. Accordingly, the comfort letter was not equivalent to a certificate of compliance.[413]

The Court of Appeal also agreed with the trial judge that there was no legislative intent to grandfather an exemption for previous landowners who had conducted remediation efforts prior to the enactment of the *EMA*.[414] The Court further noted that the exemption ICI sought would defeat the underlying "polluter pays" principle of the legislation.[415]

In addressing the apportionment of remediation costs, ICI argued that the "developer pays" principle underlies section 46(1)(m) of the *EMA*, and that a developer such as JIP should pay the additional remediation costs where it knows of past contamination on the land and undertakes additional remediation to change the use of the land.[416] ICI alleged that the additional remediation JIP undertook might increase the value of the land to JIP's benefit, and therefore JIP should bear the costs of remediation.[417] The Court of Appeal disagreed, stating that section 46(1)(m) of the *EMA* does not address the apportionment of liability.[418] The Court also noted that the trial judge did take into consideration that JIP could benefit from an increase in the value of the land, but rejected this argument because ICI failed to provide evidence of an increase in value.[419]

The Court of Appeal dismissed ICI's appeal and upheld the finding that ICI was liable for the additional costs of remediation under section 46(1)(m) of the *EMA*.[420]

4. COMMENTARY

JI is a warning to landowners and former landowners against relying entirely on comfort letters provided by government regulators and entities, particularly where the comfort letters do not meet the standards prescribed in new environmental legislation. The case is also important for its emphasis of the importance of the "polluter pays" principle in respect of the clean up of contaminated sites.

VI. PUBLIC UTILITIES

A. *FORTISALBERTA V. ALBERTA (UTILITIES COMMISSION)*[421]

1. BACKGROUND

This decision involves an appeal of two decisions from the Alberta Utilities Commission (the AUC). In the first decision on appeal, the Utilities Asset Disposition decision[422] (UAD

413 *JI*, *supra* note 391 at paras 50–51.
414 *Ibid* at para 51.
415 *Ibid* at para 77.
416 *Ibid* at para 57.
417 *Ibid*.
418 *Ibid* at para 59.
419 *Ibid* at paras 70–71.
420 *Ibid* at para 6.
421 2015 ABCA 295, 389 DLR (4th) 1 [*Fortis*].
422 *Re Utility Asset Disposition*, 2013 CarswellAlta 2369 (Alberta Utilities Commission) [*Re UAD*].

Decision), the AUC held that the risk of stranded assets must be borne by a utility's shareholders, and not by a utility's customers.[423] In respect of the second decision on appeal, the AUC Generic Cost of Capital decision from 2011[424] (GCOC Decision), the appellants argued that the GCOC Decision should be overturned because the AUC breached rules of procedural fairness during the proceeding that resulted in the GCOC Decision.[425] The appellants consisted of five electric utilities and two gas utilities (the Appellants).

2. FACTS

Following a series of highly contested cases referred to as the *Stores Block* cases, where both the Supreme Court of Canada and Alberta courts addressed the power of the AUC to deal with asset dispositions,[426] the AUC issued the UAD Decision in order to clarify the regulatory regime that applies to the disposition of utility assets. Additionally, in the AUC's view, the *Stores Block* jurisprudence provided that rates should cover the cost of a utility's assets only when such assets are "used or required to be used for utility service."[427] The UAD Decision clarified which party should bear the risk of loss on a "stranded asset," being "an asset that has lost its usefulness before the end of its expected economic life,"[428] and which has not yet fully depreciated in value. The AUC held that a utility's shareholders, and not its customers (ratepayers), should bear the risk of loss on stranded assets if extraordinary or unanticipated events occur.[429]

The *Stores Block* case[430] and subsequent related Alberta decisions (the *Stores Block* Cases) held that if an asset was "no longer used or required to be used,"[431] it would need to be removed from the rate base charged by utilities to their customers. The AUC applied the principles it said were established in these decisions and the general legislative scheme in respect of utilities in their analysis. The gas utility Appellants claimed that the *Stores Block* Cases only applied to assets disposed of outside the ordinary course of business, and not to stranded assets.[432] The electric utility Appellants claimed that because the *Stores Block* Cases dealt with gas utilities, and because the governing legislation and regulatory regime for electric utilities differs from the gas utility regime, the *Stores Block* Cases and UAD Decision were not applicable to electric utilities.[433]

In the GCOC Decision, the AUC sought to establish "the equity return and deemed capital [structure]"[434] of various utilities for 2011 and 2012. In the proceeding, the AUC commented on the issue of risk for stranded assets and concluded that such assets should be taken out of the rate base, and that instead, the utilities should bear the risk for such assets.[435] During a review of the GCOC Decision, the AUC review panel characterized its statement as *obiter*

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423 *Fortis*, *supra* note 421 at para 4.
424 *Re AUC Decision 2011-474*, 2012 Carswell Alta 984 (Alberta Securities Commission).
425 *Fortis*, *supra* note 421 at para 174.
426 *Ibid* at para 18.
427 *Ibid* at para 4.
428 *Ibid* at para 20.
429 *Re UAD*, *supra* note 422 at para 327.
430 *ATCO Gas and Pipelines Ltd v Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 SCR 140.
431 *Fortis, supra* note 421 at para 62.
432 *Ibid* at para 115.
433 *Ibid* at para 116.
434 *Ibid* at para 175.
435 *Ibid* at paras 175–76.

dicta and directed the UAD proceeding to evaluate the issue of risk for stranded assets.[436] In their appeal to the Alberta Court of Appeal, the Appellants alleged procedural unfairness on the ground that they were not given sufficient opportunity to address the impact of the AUC's statement in their submissions.[437]

3. DECISION

In addressing the appeal of the UAD Decision, the Alberta Court of Appeal characterized the issue as a determination of whether the AUC's interpretation and application of the legislative scheme and *Stores Block* Cases to the issue of risk related to stranded assets was unreasonable. The Court first addressed the gas utility Appellants' position that a utility should be able to obtain full recovery of all prudently incurred costs for an asset, even if the subject asset ceases to be "used or useful" before the end of its expected life.[438] The Court noted that the *Gas Utilities Act*[439] does not require ratepayers to pay for an asset no longer provided, even if the asset is retired due to an extraordinary event such as a flood or a fire. The Court further noted that the AUC affirmed the principle outlined in the *Stores Block* Cases that if the utility's shareholders are able to benefit exclusively from any gains on assets, they should similarly bear the risk of loss.[440] The Court also found that the utilities' ability to address extraordinary events in their business plans put them in a better position to bear the risk of loss associated with stranded assets than ratepayers.[441]

The electric utility Appellants asserted that because the *Electric Utilities Act*[442] does not contain a provision requiring assets to be "used or required to be used" in relation to setting the rate base, unlike the *GUA*, the legislature must have intended to exclude the "used or required to be used" principle from consideration in setting electricity tariffs, and that the regime for electric utilities is intended to be different because electricity markets in Alberta are deregulated.[443] In response, the Court noted that the *EUA* does not guarantee that electric utilities will be entitled to full recovery of the value of a stranded asset; the *EUA* requires only that the utility has a reasonable opportunity to recover prudently incurred costs, and gives the AUC discretion to determine the method by which such costs may be recovered.[444]

The Court emphasized the AUC's role in determining policy issues of public interest, and found the UAD Decision to be fair, legitimate, and within the AUC's legislative power.[445] Consequently, the appeal of the UAD Decision was dismissed.

In dealing with the questions related to procedural fairness raised by the Appellants in relation to the GCOC Decision, the Court determined that the AUC had taken procedural steps to ensure the parties were given the opportunity to bring evidence and submit

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436 *Ibid* at para 176.
437 *Ibid* at para 179.
438 *Ibid* at para 128.
439 RSA 2000, c G-5 [*GUA*].
440 *Fortis*, *supra* note 421 at para 141.
441 *Ibid* at para 145.
442 SA 2003, c E-5.1 [*EUA*].
443 *Fortis*, *supra* note 421 at paras 153, 155–56.
444 *Ibid* at para 159.
445 *Ibid* at para 171.

arguments on the issue of risk of loss in relation to stranded assets.[446] These steps included an opportunity for the Appellants to submit evidence during the proceeding related to the GCOC Decision, the proceeding related to the UAD Decision, and a subsequent AUC proceeding related to the generic cost of capital in 2013.[447] It ruled that the AUC's procedure was fair and the appeals of the GCOC Decision were dismissed.

4. COMMENTARY

This decision is of importance to all utilities in Alberta and their shareholders. The Court held that the decision of the AUC, which establishes that the undepreciated costs related to assets that become stranded as a result of extraordinary events will be borne by the utility and its shareholders, not by the utility's ratepayers, was legitimate and defensible in terms of policy, and was within the jurisdiction of the AUC. Following the occurrence of an extraordinary event, such as a flood or a fire, where a stranded asset is removed from the rate base, any undepreciated costs may be borne by the owner of the asset under the AUC's approach, as affirmed by the Court of Appeal.

B. *ONTARIO (ENERGY BOARD) V. ONTARIO POWER GENERATION INC.*;[448] *ATCO GAS AND PIPELINES LTD. V. ALBERTA (UTILITIES COMMISSION)*[449]

1. BACKGROUND

In the companion cases of *OPG* and *ATCO*, the Supreme Court of Canada heard appeals related to reviews of two rate-setting decisions, and considered whether utility regulators are obligated to apply a "prudence test" (or "prudent investment test") in determining whether to allow recovery of operating costs.

2. FACTS

In both *OPG* and *ATCO*, regulators denied certain costs that the utilities argued were prudent and recoverable through utility rates set by the regulator and payable by consumers. In *OPG*, Ontario Power Generation Inc. (OPG) argued that it was entitled to labour compensation costs that it was obligated to pay under collective bargaining agreements.[450] In *ATCO*, ATCO Gas and Pipelines Ltd. and ATCO Electric Ltd. argued for the recovery of annual cost of living adjustments to its pension costs.[451]

3. DECISION

The Supreme Court heard both cases together and was asked to decide whether the Ontario Energy Board (OEB) and the Alberta Utilities Commission (collectively, the Regulators) were required to use a prudence test in determining "just and reasonable" costs

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[446] *Ibid* at para 176.
[447] *Ibid* at paras 181–83.
[448] 2015 SCC 44, [2015] 3 SCR 147 [*OPG*].
[449] 2015 SCC 45, [2015] 3 SCR 219 [*ATCO*].
[450] *OPG*, *supra* note 448 at para 3.
[451] *ATCO*, *supra* note 449 at para 1.

as required by, in respect of *OPG*, the *Ontario Energy Board Act*,[452] and in respect of *ATCO*, the *Electric Utilities Act*[453] and the *Gas Utilities Act*[454] (the Statutes).[455]

Both utilities argued that the Regulators were obligated to employ a prudence test such that the utility should be entitled to recovery of their costs so long as such costs were prudent at the time they were incurred.[456] The utilities argued that this "no-hindsight" requirement prohibited the Regulators from using a benchmark analysis to compare the costs accrued by the utilities with other entities in a comparative group.[457]

OPG also argued that the OEB had historically allowed it to recover "committed costs" (being costs which had already been spent or committed pursuant to a legal obligation) and the OEB was therefore required to apply a consistent methodology and allow OPG to recover the costs at issue.[458] The Supreme Court, however, disagreed with the characterization of the costs at issue as committed costs, and chose to classify them as "partially committed."[459]

The Supreme Court concluded that the Statutes do not explicitly impose an obligation on the Regulators to conduct their analysis for cost recovery using a particular no-hindsight methodology.[460] Importantly, the Supreme Court also found that, absent express language to the contrary, there is no presumption of prudence when the onus of proof in a rate application is on the utility.[461] The Supreme Court did acknowledge in *OPG* that over time denial of prudent costs could have a dulling effect on utility investment, and that "it is essential for a utility to earn its cost of capital in the long run."[462]

OPG also challenged the propriety of the OEB acting as a party on appeal from its own decision and argued that the OEB had attempted to "'bootstrap' its original decision by making additional arguments on appeal."[463] The Supreme Court held that the standing of a tribunal in a review of its own decision was to be determined by the court conducting the first instance review in accordance with the "principled exercise of that court's discretion"[464] and provided the following non-exhaustive factors to assist courts in exercising this discretion: (1) whether the appeal or review would otherwise be unopposed; (2) whether there are other parties available with the necessary knowledge and expertise to oppose an appeal or review; and (3) whether the tribunal performed an adjudicatory function or a regulatory function in the initial decision.[465] Based on these factors, the Supreme Court held that it was not improper for the OEB to have participated in arguing in favour of the reasonableness of its decision on appeal.[466] The Supreme Court also held that although tribunals do not have an

452 1998 SO, c 15.
453 *EUA*, *supra* note 442.
454 *GUA*, *supra* note 439.
455 *OPG, supra* note 448 at paras 3-4; *ATCO, supra* note 449 at para 2.
456 *OPG*, *ibid* at paras 83–84; *ATCO*, *ibid* at paras 62–63.
457 *OPG*, *ibid* at paras 84–86; *ATCO*, *ibid* at paras 18–19.
458 *OPG*, *ibid* at para 83.
459 *Ibid* at para 86.
460 *Ibid* at paras 112–17; *ATCO*, *supra* note 449 at paras 46, 64–65.
461 *OPG*, *ibid* at paras 104; *ATCO*, *ibid* at para 45.
462 *OPG*, *ibid* at para 120.
463 *Ibid* at para 5.
464 *Ibid* at para 57.
465 *Ibid* at para 59.
466 *Ibid* at para 60.

"unfettered ability"[467] to raise new arguments on appeal, it may be permissible for a tribunal to make arguments on appeal that were not presented in the original decision, for example, if the arguments "interpret or were implicit but not expressly articulated in its original decision,"[468] are in response to an argument raised by a counterparty, or explain the tribunal's established policies to a reviewing court.[469]

4. COMMENTARY

OPG and *ATCO* clarify that regulators have broad discretion in determining the methodology to be used in deciding whether utility rates are just and reasonable, provided that they stay within the boundaries stipulated by their governing statutes. Utilities cannot assume that a regulator's past practice in setting rates will necessarily dictate the methodology that will be used in the future. Nevertheless, the Supreme Court reiterated the importance of the principle that over time, a regulated utility must be allowed the opportunity to recover its prudent costs through its rates.

The Supreme Court's decision in *OPG* also provides guidance to courts regarding the propriety of a tribunal appearing to defend its own decision on review.

C. *SASKATCHEWAN POWER CORP. ET AL. V. ALBERTA UTILITIES COMMISSION ET AL.*[470]

1. BACKGROUND

The Alberta Electric System Operator (the Operator) proposed a rule for "allocating available system electricity transmission capacity"[471] (the ATC Rule), which was adopted by the Alberta Utilities Commission (AUC).[472] The new rule was prompted by the approval and construction of the now active electric transmission line between Montana and Alberta (the MATL).[473] Four market participants (the Participants) in Alberta's electricity industry appealed the AUC's decision to approve the ATC Rule.

2. FACTS

Available transfer capability (ATC) is defined in the case as a "measure of the ability of a system to transfer energy."[474] Prior to the adoption of the ATC Rule, ATC was allocated by the last-in-first-out method, which was thought to be unfair by the Operator.[475] The ATC Rule sought to allocate ATC based on a pro rata system, which allocated ATC between interties based on demand.[476]

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467 *Ibid* at para 69.
468 *Ibid* at para 68.
469 *Ibid*.
470 2015 ABCA 183, 600 AR 337 [*Saskatchewan Power*].
471 *Ibid* at para 1.
472 *Re Alberta Electric System Operator*, 2013 Carswell Alta 139 (Alberta Utilities Commission).
473 *Saskatchewan Power*, *supra* note 470 at para 2.
474 *Ibid* at para 13.
475 *Ibid* at para 14.
476 *Ibid* at para 15.

Pursuant to sections 16 and 17 of the *Electric Utilities Act*,[477] the Operator must encourage a fair, efficient, and open market for electricity, and provide market participants with a reasonable opportunity to participate in the market for electricity.[478] The Participants objected to the ATC Rule on the basis that: (1) it did not promote a fair, efficient, and open electricity market; (2) it was not in the public interest to adopt the ATC Rule; and (3) it was technically deficient.[479] The AUC determined that the ATC Rule was compliant with legislation and that its adoption was in the public interest.[480] The Participants appealed the AUC's decision to the Alberta Court of Appeal, and were granted leave to appeal on two grounds: (1) whether the AUC erred in "finding that the Operator was required by statute to provide system access service to intertie operators"[481] pursuant to section 29 of the *EUA*; and (2) whether the AUC erred in its interpretation of sections 16 and 27 of the *Transmission Regulation*,[482] which require the Operator to plan and make arrangements to restore the Alberta-British Columbia and Alberta-Saskatchewan interties to full capacity.[483]

3. DECISION

At the outset, the Court determined that the appropriate standard of review of the AUC's decision was one of reasonableness.[484] This required the Participants to prove that the AUC's interpretation of the relevant provisions of the *EUA* and the *Regulation* was unreasonable.[485] The parties agreed that on a review of reasonableness, the Court is to defer to a reasonable interpretation adopted by an expert tribunal even if there are one or more other reasonable interpretations.[486] The Court dismissed the appeal, holding that the Participants had failed to persuade the Court that the AUC's decision was unreasonable.[487]

On the first ground of appeal, the Court held that the AUC's interpretation of the phrase "reasonable opportunity" in section 29 of the *EUA* as requiring the Operator to "treat each market participant, whether a generator or an intertie, equally,"[488] was not unreasonable.[489]

Many of the Participants focused on individual words included in section 29 in support of their arguments for a different interpretation of section 29. The Court rejected these arguments, finding that reliance on specific modifying words in section 29 was contrary to the general principles of statutory interpretation.[490]

On the second ground of appeal, the Court upheld the AUC's interpretation of sections 16 and 27 of the *Regulation*. Section 16 of the *Regulation* states, in part, that:

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[477] *EUA*, *supra* note 442.
[478] *Saskatchewan Power*, *supra* note 470 at para 11.
[479] *Ibid* at para 16.
[480] *Ibid* at para 18.
[481] *Ibid* at para 20.
[482] Alta Reg 86/2007 [*Regulation*].
[483] *Ibid* at para 20.
[484] *Saskatchewan Power*, *supra* note 470 at para 21.
[485] *Ibid* at para 23.
[486] *Ibid* at para 59.
[487] *Ibid*.
[488] *Ibid* at para 37.
[489] *Ibid* at para 46.
[490] *Ibid* at paras 39–40.

> (1) … the [Operator] must prepare a plan and make arrangements to restore each intertie that existed on August 12, 2004 to, or near to, its path rating.
>
> …
>
> (4) This section shall not be interpreted as meaning that priority should be given to interties that existed on August 12, 2004 over interties existing after that date in respect of the allocation of available transfer capability.[491]

The interties "that existed on August 12, 2004"[492] refer to the Alberta-British Columbia and Alberta-Saskatchewan interties. The Participants argued that the effect of the ATC Rule (which allocates some ATC to the MATL intertie) is contrary to section 16 of the Regulation, which requires the Operator to restore the ATC of other interties.[493] While the Court considered some of these arguments to be reasonable, it did not find that the Participants had reached the required threshold (that is, showing that the AUC's decision was unreasonable).[494]

Similarly, the Court held that the AUC's decision that the ATC Rule was not contrary to section 27 of the *Regulation*, which required that a new intertie operator bear the costs of operating and constructing a new intertie, was reasonable.[495] The Court was persuaded by the AUC's factual conclusions that the ATC was a "system resource that does not "belong" to any particular intertie."[496] The Court also found no reason to intervene regarding the AUC's rejection of the Participants' argument that the decision was not in the public interest, which was based on assertions that the ATC Rule would have an adverse financial effect on Alberta ratepayers by allocating ATC to the private, for-profit Montana intertie.[497]

4. COMMENTARY

This decision will have an impact on companies involved in power generation or transmission in Alberta, particularly those companies that are involved with the Alberta-British Columbia or the Alberta-Saskatchewan interties. It also demonstrates the significant level of deference courts show to administrative decision makers interpreting their governing legislation and when addressing matters within their core function.

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491 *Ibid* at para 52, citing *Regulation*, *supra* note 482, s 16.
492 *Regulation, ibid*, ss 16(1), (4).
493 *Saskatchewan Power*, *supra* note 470 at para 54.
494 *Ibid* at para 60.
495 *Ibid* at para 70.
496 *Ibid* at para 66.
497 *Ibid* at para 73.

VII. TAXATION

A. *BIRCHCLIFF ENERGY LTD. V. R.*[498]

1. BACKGROUND

The Minister of National Revenue (the Minister) disallowed Birchcliff Energy Ltd.'s (Birchcliff Energy) deduction of losses from its 2006 taxation year income because the losses had been incurred by a predecessor corporation, Veracel Inc. (Veracel), before it amalgamated with the pre-amalgamation Birchcliff Energy Ltd. (Birchcliff).[499]

Section 111(5) of the *Income Tax Act*[500] restricts the use of a corporation's losses to offset income if there has been an acquisition of control of the corporation. Birchcliff Energy argued there was no acquisition of control. Therefore, for the first time, the Tax Court of Canada was asked to apply the General Anti-Avoidance Rule (GAAR) to an acquisition of control loss trading scenario.[501]

2. FACTS

Veracel was having financial difficulties, so it sought to monetize over $16 million in non-capital losses. Birchcliff wished to purchase oil and natural gas properties, financed through equity. Veracel and Birchcliff executed a plan of arrangement to effect an amalgamation. Part of the plan involved Veracel, immediately before amalgamation, issuing subscription receipts for Veracel common shares to new investors interested in Birchcliff's oil and gas business plan.[502] Upon amalgamation, those shares were exchanged for common shares in the amalgamated corporation, Birchcliff Energy, representing a majority of its voting shares.[503] As a result, the new investors had been shareholders of Veracel only "for a fleeting moment."[504]

Section 256(7)(b)(iii) of the *ITA* deems control of a predecessor corporation to have been acquired upon amalgamation unless the shareholders of that corporation acquire a majority of the shares in the amalgamated corporation.[505] Because Veracel, as predecessor corporation, issued the subscription receipts to the new investors, those investors became shareholders in Veracel immediately before amalgamation. Upon amalgamation, those investors became majority shareholders of Birchcliff Energy, the amalgamated corporation, engaging the exception to section 256(7)(b)(iii).

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[498] 2015 TCC 232, 2015 DTC 1198 [*Birchcliff*].
[499] *Ibid* at para 1.
[500] RSC 1985, c 1 (5th Supp) [*ITA*].
[501] Alan M Schwartz, *GAAR Interpreted: The General Anti-Avoidance Rule* (Toronto: Carswell, 2006) (loose-leaf revision 2015:2), ch 5.74 at 5-531.
[502] *Birchcliff*, *supra* note 498 at para 13.
[503] *Ibid* at para 94.
[504] *Ibid* at para 13.
[505] *ITA*, *supra* note 500, s 256(7)(b)(iii).

3. DECISION

The Minister argued that the GAAR applied to disallow Birchcliff Energy's deduction of the non-capital losses because the transaction was designed to avoid the acquisition of control of Veracel.[506]

The Court agreed. The test for the GAAR was satisfied because: (1) Birchcliff Energy enjoyed a tax benefit; (2) the transaction was an avoidance transaction; and (3) the transaction was abusive.[507] Therefore, Veracel's issuance of common shares was ignored, control of Veracel was acquired upon amalgamation, and section 111(5) prevented Birchcliff Energy from deducting Veracel's losses.[508]

4. COMMENTARY

Birchcliff is the first reported case to apply the GAAR to a transaction involving the acquisition of control under section 111(5) between a "profitco" and a "lossco," and the streaming of the losses of the lossco.[509] The Court did not determine if there is a general policy prohibiting loss trading between unrelated parties.[510] This suggests that the decision may have limited relevance to profitco-lossco transactions that do not fit within the narrow facts of this case.

Birchcliff Energy has filed a notice to appeal the decision to the Federal Court of Appeal.

VIII. BUILDERS' LIENS

A. *STUART OLSON DOMINION CONSTRUCTION LTD. V. STRUCTAL HEAVY STEEL*[511]

1. BACKGROUND

In *Stuart Olson*, the Supreme Court of Canada clarified that builders' lien and trust remedies are not mutually exclusive under Manitoba's *The Builders' Liens Act*.[512] The Supreme Court explained that unpaid subcontractors have recourse to both remedies, and that registering a lien bond in court as security for a builder's lien does not relieve a contractor from its trust obligations under the *BLA*.[513]

2. FACTS

BBB Stadium Inc. (the Owner) hired Dominion Construction Company Inc. (now Stuart Olson Dominion Construction Ltd.) (the Contractor) to construct a football stadium in

[506] *Birchcliff*, *supra* note 498, at paras 16, 62.
[507] *Ibid* at paras 63-65.
[508] *Ibid* at para 112.
[509] Schwartz, *supra* note 501 at 5-531.
[510] *Birchcliff*, *supra* note 498 at para 85.
[511] 2015 SCC 43, [2015] 3 SCR 127 [*Stuart Olson*].
[512] CCSM, c B91 [*BLA*].
[513] *Stuart Olson*, *supra* note 511 at para 3.

Winnipeg, Manitoba (the Project).[514] The Contractor hired Structal Heavy Steel (the Subcontractor) to supply and install steel for the Project.[515]

Partway through construction, the Contractor withheld payment from the Subcontractor as a result of delays during construction that it attributed to the Subcontractor.[516] In response, the Subcontractor registered a $15 million builder's lien against the property.[517] The Contractor filed a lien bond with the Manitoba Court of Queen's Bench for the full amount of the lien.[518] The lien bond provided that if the Contractor failed to satisfy any judgment for the lien, the surety would satisfy the judgment, up to the amount of the bond.[519]

With the lien bond filed, the Subcontractor agreed to discharge its lien; however, the Subcontractor asserted that the Contractor was still required to comply with the trust provisions of the *BLA*.[520] Such provisions require the Contractor to hold progress payments it receives from the Owner in trust for the Subcontractor.[521]

The Contractor disagreed with the Subcontractor's assertion, claiming that it was not required to comply with the *BLA*'s trust provisions because the Subcontractor was fully secured by the bond.[522] The Subcontractor, however, persuaded the Owner not to make a $3.5 million progress payment to the Contractor because the payment had potential to be in breach of the *BLA*'s trust provisions.[523]

The Contractor applied to the Manitoba Court of Queen's Bench for an order declaring that filing the lien bond satisfied its trust obligations, and that it was entitled to receive the $3.5 million progress payment from the Owner to pay its other subcontractors.[524]

3. DECISION

The Supreme Court of Canada was asked to determine whether a contractor, by filing a lien bond in court to vacate a builder's lien, satisfies its trust obligations to the subcontractor who registered the lien against the project land or facilities.[525]

The Supreme Court agreed with the Manitoba Court of Appeal that the right to impose a lien and the rights under the *BLA*'s trust provisions are separate and distinct.[526]

The Supreme Court explained that the trust remedies under the *BLA* are more far-reaching than statutory lien rights.[527] The statutory trust that is created under the *BLA* holds trust funds

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514 *Ibid* at para 4.
515 *Ibid*.
516 *Ibid* at para 5.
517 *Ibid* at para 6.
518 *Ibid*.
519 *Ibid*.
520 *Ibid* at para 7.
521 *Ibid* at para 27, citing the *BLA*, *supra* note 512, s 4(1).
522 *Stuart Olson*, *ibid* at para 8.
523 *Ibid* at para 9.
524 *Ibid*.
525 *Ibid* at para 2.
526 *Ibid* at para 32.
527 *Ibid*.

for many different actors in addition to subcontractors, including the Workers' Compensation Board, the contractor's employees, and the project owner in relation to any amounts owing as a result of a right to set-off or counterclaim under the project agreements.[528] The builder's lien, on the other hand, is narrower in scope, and is a remedy only available to "persons who do any work, provide any services, or supply materials."[529]

Moreover, a lien creates an encumbrance on the land. Any money paid or security given into court does not, as the trial judge stated, stand in place of the lien; rather, it stands in place of the land in securing the interests of the lien registrant, ensuring that the lien claimant will be able to collect should the lien claimant be successful in the lien action.[530]

The *BLA*'s trust provisions, on the other hand, are designed to ensure that amounts owing by the various parties engaged in the building project are paid in accordance with the contractual terms under which they arose.[531] Section 4(3) of the *BLA* provides that contractors and owners shall not divert statutory trust funds for their own use until subcontractors are paid all amounts owing to them.[532] Accordingly, the Supreme Court found that "[a] lien bond merely *secures* a contractor's or subcontractor's lien claim rather than satisfying it through payment. It does not extinguish the owner's or contractor's obligations under the statutory trust."[533]

The Supreme Court also found that if a trust claim was extinguished by filing a lien bond, it would undermine the purpose of the statutory trust. It noted that:

> If [the Contractor] were correct that the mere filing of the lien bond extinguished a contractor's or owner's trust obligations, enabling the owner or contractor to appropriate the trust funds for his or her own use, the claimant would be left with no lien claim and no trust monies if the lien claim failed. Such interruption of the flow of funds down the so-called construction pyramid, from the owner to the contractor, to each subcontractor and supplier, is the very problem that the trust provisions were designed to address.[534]

In addition, the Supreme Court held that, contrary to the trial judge's view, double payment would not occur, as there is a difference between filing security and actual payment.[535] Although a contractor may end up paying double security, section 55(2) of the *BLA* helps to avoid such a result by allowing the payor to pay cash into court instead of filing a lien bond.[536]

4. COMMENTARY

Under the *BLA*, contractors and owners paying cash into court to satisfy a lien claim (rather than filing a lien bond) may be able to claim that such cash stands as security in place

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528 *Ibid*, citing the *BLA*, *supra* note 512, s 4(1).
529 *Stuart Olson*, *ibid* at para 18, citing *BLA*, *ibid*, s 13.
530 *Stuart Olson*, *ibid* at para 22.
531 *Ibid* at para 40, citing *Provincial Drywall Supply Ltd v Gateway Construction Co* (1993), 101 DLR (4th) 111 (Man CA) at para 47.
532 *BLA*, *supra* note 512, s 4(3).
533 *Stuart Olson*, *supra* note 511 at para 43 [emphasis in original].
534 *Ibid* at para 41.
535 *Ibid* at para 46.
536 *Ibid*.

of the land against which a lien is registered and that it also satisfies the statutory trust requirements. By ensuring monies are held in trust for the beneficiary, the contractor or owner is doing what the *BLA* requires, and as long as the trust funds themselves are deposited with the court, the funds are secure and the trust has not been breached.[537] Filing a lien bond in court, however, will not achieve the same effect. Consequently, if a lien bond is filed, a separate statutory trust will still need to be maintained under the *BLA*.

Previous ambiguity in the law may have permitted owners and contractors to file a lien bond with the court and make use of cash for purposes other than payment into the statutory lien fund. This practice is now prohibited in Manitoba as a result of the *Stuart Olson* decision, which may also have the effect of restricting the use of capital that owners and contractors previously had access to during the course of a project.

It should be noted that the impact of this decision may vary between provinces depending on the language of the provincial builders' lien legislation.

IX. CASES TO WATCH

The following cases of interest to energy lawyers have either been granted leave to appeal to the Supreme Court of Canada or have been heard by the Supreme Court of Canada and the decision has been reserved.

A. *ERNST V. ENCANA CORP. ET AL.*[538]

The Alberta Court of Appeal upheld a decision that the Province's Energy Resources Conservation Board (now Alberta Energy Regulator) did not owe Jessica Ernst, a landowner who alleged that hydraulic fracturing damaged her freshwater supply, a private law duty of care, and that even if it did owe her such a duty, the regulator was shielded from liability for any breach of that duty and for any claims based on the *Canadian Charter of Rights and Freedoms*,[539] by an immunity provision in the Regulator's governing legislation. The Supreme Court of Canada heard Ernst's appeal on 12 January 2016, but has not yet released its decision. Ernst specifically presented the Supreme Court with the question of whether legislation is able to "block an individual from seeking a remedy for a breach of ... *Charter* rights pursuant to s. 24(1) of the [*Charter*]?"[540]

B. *LEDCOR CONSTRUCTION LTD. V. NORTHBRIDGE INDEMNITY INSURANCE CO. ET AL.*[541]

The Alberta Court of Appeal held that the interpretation of standard form wording in insurance contracts has great precedential value and its primary objective must therefore be consistent construction and, to the extent possible, based on the clear and unambiguous

537 *Ibid*.
538 2014 ABCA 285, 580 AR 341, leave to appeal to SCC granted, 36167 (30 April 2015) [*Ernst*].
539 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982 c 11 [*Charter*].
540 *Ernst*, *supra* note 558 (Memorandum of Argument of the Appellant at para 1), online: <www.scc-csc.ca/case-dossier/info/mal-mdaa-eng.aspx?cas=36167>.
541 2015 ABCA 121, 599 AR 363.

language of the contract.[542] According to the Court, the interpretation of contracts is a question of mixed fact and law, and the standard of review for the interpretation of insurance policies should be correctness.[543] Previous Supreme Court of Canada jurisprudence has indicated that the standard for contract interpretation, generally, is reasonableness. The Supreme Court granted leave to appeal the decision on 24 September 2015.[544]

C. *HAMLET OF CLYDE RIVER V. TGS-NOPEC GEOPHYSICAL COMPANY ASA (TGS)*[545]

This case involved an application to conduct an offshore seismic program on the coast of Baffin Island. The Federal Court of Appeal held that when the Crown relies on a tribunal to fulfill the procedural steps of the Crown's duty to consult, the Crown must still independently verify whether additional consultation is required to fully satisfy its obligations.[546] The decision implies that, depending on the strength of the prima facie Aboriginal claim and the seriousness of the potentially adverse effect on the subject Aboriginal rights, the Crown may be able to fulfill its duty to consult, at least in part, by delegating its responsibilities to a tribunal.[547] The Supreme Court of Canada granted leave to appeal the decision on 6 April 2016.[548]

D. *FAIRMONT HOTELS V. CANADA (ATTORNEY GENERAL)*;[549] *CANADA (ATTORNEY GENERAL) V. GROUPE JEAN COUTU (PJC) INC.*[550]

The Supreme Court of Canada has granted leave to appeal the decision of the Quebec Court of Appeal in *Jean Coutu* and the decision of the Ontario Court of Appeal in *Fairmont*, both of which relate to the purported rectification of mistakes that led to adverse tax consequences. Clarification from the Supreme Court of Canada is sought with respect to the circumstances in which a rectification order may be seen to amount to retroactive tax planning, as well as with respect to whether the "intention" required to be proven in tax rectification cases consists of a general intention to enter into a "tax neutral" transaction, or something more specific.

E. *KTUNAXA NATION COUNCIL V. BRITISH COLUMBIA (MINISTER OF FORESTS, LANDS, AND NATURAL RESOURCES OPERATIONS)*[551]

Ktunaxa Nation concerned an application for judicial review by the Ktunaxa Nation (the Ktunaxa) of the approval by the British Columbia Minister of Forests, Lands, and Natural Resource Operations of a Master Development Plan (MDA) to build a year-round ski resort,

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542 *Ibid* at para 16.
543 *Ibid* at para 18.
544 2015 ABCA 121, 599 AR 363, leave to appeal to SCC granted, 36452 (24 September 2015).
545 2015 FCA 179, [2016] 3 FCR 167 [*Hamlet*].
546 *Ibid* at para 65.
547 *Ibid* at para 72.
548 2015 FCA 179, [2016] 3 FCR 167, leave to appeal to SCC granted, 36692 (10 March 2016).
549 2015 ONCA 441, 45 BLR (5th) 230 [*Fairmont*], leave to appeal to SCC granted, 36606 (10 December 2015).
550 2015 QCCA 838, [2015] 4 CTC 82 [*Jean Coutu*], leave to appeal to SCC granted, 36505 (19 November 2015).
551 2015 BCCA 352, 387 DLR (4th) 10 [*Ktunaxa Nation*], leave to appeal to SCC granted, 36664 (17 March 2016).

known as Jumbo, located west of Invermere, on lands the Ktunaxa considered to be sacred and spiritual. The Ktunaxa argued that the MDA violated their right to freedom of religion under section 2(a) of the *Charter*[552] and their Aboriginal rights provided for by section 35 of the *Constitution Act, 1982*,[553] which imposes a duty upon the Crown to consult with Aboriginal peoples where the Crown contemplates any action that may adversely affect an Aboriginal or treaty right. The British Columbia Court of Appeal held that section 2(a) of the *Charter* does not apply to protect one religious community's beliefs where the protection of such beliefs would require that constraints (including apparently that no development occur) be imposed on others, who do not share the same beliefs, and that there had been adequate consultation with the Ktunaxa prior to the issuance of the MDA.[554]

F. ABORIGINAL GROUP OPPOSITION TO BRITISH COLOMBIA SITE C HYDROELECTRIC DAM[555]

Numerous lawsuits have been filed by Aboriginal groups in British Columbia and Alberta, in both the federal and superior courts, seeking judicial review of the Government of British Columbia's issuance of permits for the construction of the Site C Hydroelectric Dam. These actions are based primarily on two grounds: first, that these groups' treaty and Aboriginal rights, for instance hunting and fishing rights, would be adversely affected by the flood plain the dam's construction would create; and second, that the government failed to properly discharge its duty to consult with these Aboriginal groups.

G. *REDWATER ENERGY CORPORATION (RE)*[556]

Industry and the public may face significantly higher costs as a result of the much anticipated decision of the Alberta Court of Queen's Bench in *Redwater*, issued on 17 May 2016. Departing from previous case law, the Court found that trustees and receivers of insolvent companies can disclaim to the Alberta Energy Regulator (AER) uneconomic oil and gas assets, and then sell the valuable oil and gas assets for the benefit of secured creditors. This decision has been appealed. The appeal was argued on 11 October 2016. It is certain to be the subject of considerable discussion. In June 2016, the AER published a bulletin announcing changes to its liability management programs pending the outcome of this litigation on the implementation of additional regulatory measures.[557]

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552 *Supra* note 539.

553 *Supra* note 111.

554 *Ktunaxa Nation*, *supra* note 551.

555 James Keller, "First Nations Launch Federal Court Challenge of B.C.'s Site C Dam," *The Globe and Mail* (12 November 2014), online: <www.theglobeandmail.com/news/british-columbia/first-nations-launch-federal-court-challenge-of-bcs-site-c-dam/article21568662/>; "2 Alberta First Nations File Suit Against Site C Dam Project," *CBC News* (14 November 2014), online: <www.cbc.ca/news/canada/north/2-alberta-first-nations-file-suit-against-site-c-dam-project-1.2835313>; "Blueberry River First Nations Lawsuit Threatens Site C, Fracking in B.C.," *CBC News* (4 March 2015), online: <cbc.ca/news/Canada/blueberry-river-first-nations-lawsuit-threatens-site-c-fracking-in-b-c-1.2981820>.

556 2016 ABQB 278, (*sub nom Grant Thornton Ltd v Alberta Energy Regulator*) 33 Alta LR (6th) 221 [*Redwater*].

557 Alberta Energy Regulator, "Bulletin 2016-16: Licensee Eligibility – Alberta Energy Regulator Measures to Limit Environmental Impacts Pending Regulatory Changes to Address the Redwater Decision" (AER, 20 June 2016), online: <www.aer.ca/documents/bulletins/Bulletin-2016-16.pdf>.

In the fall of 2015, a receiver and trustee (the Receiver) was appointed in respect of Redwater Energy Corporation (Redwater) under the *Bankruptcy and Insolvency Act*.[558] The Receiver "disclaimed" a significant number of Redwater's properties (which had little or no economic value and substantial associated environmental liabilities) pursuant to section 14.06 of the *BIA*, which was enacted in 2007.[559] The AER and the Orphan Well Association (OWA) sought a declaration that the Receiver was not entitled to disclaim any of Redwater's assets, and an order requiring the Receiver to comply with remedial orders issued by the AER and fulfill the abandonment, reclamation, and remediation obligations of a licensee.[560] The Receiver sought dismissal of the application, and approval by the Court of its proposed sale of the Redwater assets which did not include the uneconomic assets.

Before this decision, the Alberta Court of Appeal decision in *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.*,[561] along with certain legislation, governed the obligations of receivers and trustees. In *Northern Badger*, the Court held that end of life liabilities were inherent or inchoate obligations of a licensee.[562] The Court also held that receivers could not "pick and choose"[563] among the assets, and that orders of the AER must be complied with by a receiver despite potentially reducing the funds remaining for a secured creditor.[564] In addition, pursuant to provincial legislation, a receiver or trustee is deemed a "licensee" with the attendant obligations.

The AER's historical approach to managing these liabilities has been to ensure that responsibility for both the uneconomic assets, being those having a value less than the associated abandonment and similar liabilities, and the economic assets is resolved prior to the transfer of any licences associated with administered assets. Resolution was achieved by one or more of the following: transferring those liabilities to a solvent licensee; posting security deposits; or attending to the liabilities.

Where no buyer of the assets could be found, financial liability would generally be limited to the current licensee and current working interest participants. Each party's liability was limited to its proportionate share of ownership in the assets (in other words, liability is not joint and several). To the extent that owners were insolvent or otherwise defunct, the AER could classify the assets as "orphaned." Orphaned assets became the responsibility of the industry-funded OWA and the receiver's liability would be limited to the value of the assets. The obligations of a licensee until *Redwater* were thus imposed on trustees and receiver-managers by provincial legislation, including obligations with respect to the abandonment, reclamation, and remediation of the administered assets.

The critical finding of *Redwater* was that section 14.06 of the *BIA* allows a receiver to disclaim or renounce uneconomic assets to the AER. Moreover, once the assets are disclaimed, a receiver has no obligation to carry out the licensee's duties.[565]

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[558] RSC 1985, c B-3 [*BIA*]; *ibid* at 4.
[559] *BIA*, *ibid* at s 14.06.
[560] *Redwater*, *supra* note 556 at para 40.
[561] 1991 ABCA 181, 81 DLR (4th) 280 [*Northern Badger*].
[562] *Ibid* at 290.
[563] *Ibid* at 297.
[564] *Ibid* at 298.
[565] *Redwater*, *supra* note 556 at para 150.

The Court's decision was based on its determination that there is a conflict between the *BIA* and provincial legislation, which means that the federally enacted *BIA* must prevail over the provincial legislation under the doctrine of federal paramountcy.[566]

The Court also held that the inclusion of receivers in the definition of "licensee" in the provincial legislation frustrated the ability of a receiver to renounce assets under the *BIA*.[567] Certain other provisions of the relevant legislation that impose abandonment obligations and responsibility for related costs and place restrictions on licence transfers were also found to have no effect to the extent that they conflicted with the *BIA*.[568]

Finally, the Court found that the AER closure and abandonment orders were "provable" claims, as opposed to true regulatory obligations.[569] Whether an order is a true regulatory obligation or a provable claim is largely dependent upon whether or not the regulatory authority will do the work and as a result ultimately have a monetary claim against the estate. In *Redwater*, the Court found that there were "no other owners or purchasers of the renounced sites who could be compelled to carry out the abandonment work,"[570] thus making it likely that the AER or the OWA would fulfill the responsibilities.

The Court's finding that a receiver may disclaim uneconomic assets means that the disclaimed assets may become the sole responsibility of the OWA if the AER deems the assets to be orphaned.

Redwater also leads to questions regarding how current legislation and policy applies to assets that are not disclaimed and that remain under the administration of a receiver. The Court ruled that AER legislation and policy does not apply to the extent it conflicts with the *BIA*. While the Court's ruling in respect of the non-disclaimed assets in this regard was clearly focused on the AER's licence transfer rules, the practical extent of this part of the decision is unclear. Questions may arise as to whether any of the other many obligations that apply to licensees are binding on receivers in respect of the assets they are administering where it can be argued that those obligations conflict with the *BIA*.

The Court's decision that closure and abandonment orders issued by the AER are provable claims means that they would seem to rank second to the financial claims of secured creditors. This determination would seem to have little relevance to disclaimed assets because once the assets are disclaimed the receiver has no operational responsibility for those assets. There is, however, uncertainty concerning how broadly this finding applies. For example, it seems inconceivable that a receiver could ignore a closure or abandonment order that was directed at an immediate safety issue; if the closure or abandonment order is directed at less urgent concerns, perhaps it would not require action by the receiver.

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566 *Ibid* at para 155.
567 *Ibid* at para 181.
568 *Ibid* at para 182.
569 *Ibid* at paras 170–72.
570 *Ibid* at para 145.