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Mining in the Courts

Year in Review

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Welcome to *Mining in the Courts*, 2023

Welcome to the 13th annual edition of *Mining in the Courts*, a publication of McCarthy Tétrault LLP's Mining Litigation Group that provides a one-stop annual update on legal developments impacting the mining industry.

In 2022, the ongoing impacts of COVID-19, the war in Ukraine, supply chain disruption, rising interest rates and rising inflation all tested the resiliency of the mining industry. But despite it all, the sector remains a vital contributor to the global economy. Over the past year the mining industry continued to be front and centre on a number of developments across various areas of law including Aboriginal law, administrative law, class actions, contract law, shareholder disputes, and tort law. Many of these cases are summarized inside this publication, allowing you to see the impact you have had on the development of Canadian law.

In addition to providing summaries of important cases impacting the mining sector, this edition contains articles with our insights on current legal trends and what we think the industry can expect to face in the coming year. Climate change continues to be a key issue, and *Implementation or Bust: Key Outcomes from the COP 27 Climate Change Conference* (pg. 58) summarizes the key outcomes from COP 27 and Canadian initiatives to address climate change. With inflation being top of mind across all sectors, *Riding the Costs Escalator – Managing Risk in a Volatile Market* (pg. 42) discusses ways to manage cost escalation risk in construction projects. Other noteworthy articles include *B.C. Commits to Modernize Mineral Tenure Regime and Other Extensive Actions in the UNDRIP Action Plan* (pg. 9), which discusses B.C.'s "Declaration on the Rights of Indigenous Peoples Act Action Plan", and *Reverse Vesting Orders: Exceptional but Still Possible* (pg. 30), which discusses the circumstances in which a reverse vesting order should be granted.

We hope you find this edition of *Mining in the Courts* useful.

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Case Law Summaries

Aboriginal Law

Heather Maki, Bryn Gray, and Selina-Lee Andersen

In 2022, Canada saw a number of Aboriginal law and policy developments with implications for the mining sector. This includes court decisions that could affect claims in tort brought by Aboriginal rights holders against proponents, remedies for challenges to projects on the basis of the duty to consult and new court challenges relating to cumulative effects on Aboriginal and treaty rights. It also includes further steps by the federal government to provide guidance on the use of Indigenous knowledge in federal project reviews and regulatory decisions and steps by the B.C. and federal governments to implement the *UN Declaration on the Rights of Indigenous Peoples*.

Proponents can be Liable in Nuisance for Unreasonable Interference With Aboriginal Rights if Impacts are not Authorized by Governments

Earlier this year, the Supreme Court of British Columbia in *Thomas and Saik'uz First Nation v. Rio Tinto Alcan Inc. (Thomas)*.[1] dismissed a claim by two B.C. First Nations against the owner/operator of a hydroelectric dam for nuisance and breach of riparian rights. The Court recognized that tort claims could be brought against a non-government entity for interference with established Aboriginal rights. However, it dismissed the claim after finding that the company had complied with all applicable regulatory requirements in constructing and operating

1 2022 BCSC 15.

the dam and therefore had established the defence of statutory authorization. The Court found that any legal remedy for the First Nations must be pursued against the B.C. and federal governments. This decision is currently under appeal to the B.C. Court of Appeal.

By way of background, in the 1950s, the government of British Columbia authorized the construction of the Kenney Dam (Dam) to produce hydroelectricity for the smelting of aluminum. The Saik'uz and Stellat'en First Nations (First Nations) alleged that the Dam and the alteration of the water flowing to the Nechako River had significantly impacted their Aboriginal rights, title, and fisheries which had resulted in a nuisance and a breach of their riparian rights. The First Nations sought injunctive relief to restore a more natural water flow to the Nechako River as well as damages, although they did not pursue damages at trial.

The decision of Justice Nigel Kent in *Thomas* was released following a 189-day trial that considered multiple complex issues, including whether the First Nations had proven the Aboriginal rights and title they were asserting.

Justice Kent recognized that the First Nations held an Aboriginal right to fish for food, social and ceremonial purposes but declined to recognize Aboriginal title to two reserves (due to the absence of evidence from First Nations with overlapping claims) and the riverbed of the Nechako River (due to the failure to establish the requirements for title, including exclusivity). He held that interference with Aboriginal interests, including Aboriginal rights and reserve land interests, can serve as a basis for a common law tort action against non-government entities, subject to the defence of statutory authority. While nuisance claims normally relate to land, he found that the Aboriginal right to fish could be a sufficient basis for an action in private nuisance because the right is closely related to a particular piece of land.[2]

Justice Kent found that the construction and operation of the Dam had negative effects on the abundance and health of certain fish populations in the watershed, which had negatively impacted the First Nations' Aboriginal rights to fish and met the requirements of the tort of nuisance (a non-trivial and unreasonable interference). However, the proponent was not liable because its operation of the Dam was authorized by the government and was in compliance with all regulatory requirements. He also dismissed the claim of breach of riparian rights because there was no evidence that showed the First Nations possessed ownership or control of the water before the assertion of Crown sovereignty.

The defence of statutory authority applies if the nuisance, or commission of another tort, is the inevitable result of exercising power authorized by Parliament or the Legislature. In this case, the design, construction and entire operation of the Dam was approved by all levels of government, and the Court found that the proponent has always operated within the parameters of its authorization and complied with the water flow directions. As a result, the Court concluded that the defence clearly and appropriately applied in the circumstances of this case.

It is a significant development that a Canadian court has confirmed that Aboriginal rights can be the foundation for actions in tort law against private companies. This case shows that private entities may be open to liability if they do not comply with their authorizations or engage in other unauthorized activity that interferes with Aboriginal rights and interests. However, this case also confirms that, if private entities follow and rely on government authorizations, the claim then rests between the Indigenous claimant and the government. The Court suggested that the Crown might have liability to the First Nations for damages related to the government's past and perhaps ongoing involvement in the construction and operation of the Dam, but no claim for damages was being pursued against the Crown in this case.[3]

This is also notably the second Canadian court decision to consider claims to Aboriginal title to submerged lands.[4] Both decisions (which are both currently under appeal) have either dismissed or declined to make findings of Aboriginal title to submerged lands due to the Aboriginal title test not being met and issues relating to the public right of navigation. In this case, Justice Kent noted that the public right of navigation. would appear to be a barrier for any Aboriginal title claim to the bed of a navigable waterway.[5] However, the court left open the possibility that Aboriginal title could be found to non-navigable waters, such as a landlocked lake that is fully bounded by land to which Aboriginal title has been found.[6]

2 *Thomas* at para. 377.

3 *Thomas* at para. 490.

4 The first Canadian court decision to consider claims to Aboriginal title to submerged lands is *Saugeen First Nation v. The Attorney General of Canada*, 2021 ONSC 4181. The Ontario Superior Court found that, while there was evidence of the Saugeen Ojibway Nation's historic presence on the waters for fishing and ceremonial practices, there was insufficient evidence of exclusive and sufficient use and occupancy of the submerged land claimed to meet the test for Aboriginal title and that the recognition of Aboriginal title in this case would raise significant issues with the public right of navigation.

5 *Thomas* at para. 331.

6 *Thomas* at para. 332.

Ontario Court Declines to Quash Permits After Finding Crown Breached Duty to Consult

In *Attawapiskat First Nation v. Ontario*,[7] the applicant (Attawapiskat) sought an order quashing two mineral exploration permits issued by the Ontario director of exploration to Juno Corp. on the basis that Ontario did not adequately fulfil the duty to consult and accommodate. The Ontario Divisional Court granted the application. However, it declined to set aside the permits on the basis that the breach was minor and that it would be unreasonable to require further consultation and accommodation, given the record before the Court.

In this case, the proponent applied for two early mineral exploration permits on lands covered by Treaty 9. Like many numbered treaties, Treaty 9 provides Attawapiskat

7 2022 ONSC 1196.

with treaty rights to continue to hunt, trap and fish on treaty lands that are not taken up for various purposes.

Attawapiskat asserted that the proposed projects would disrupt traditional harvesting activities because an Attawapiskat family had trap lines in the area of the projects. Attawapiskat argued that the Crown failed to fulfil its duty to consult for several reasons, including that Ontario had refused to provide them with funding to obtain a targeted archeological assessment and a traditional land-use and occupancy study.

The Court determined that the Ministry correctly assessed the scope of duty at the low end of the spectrum given the limited nature, geographic scope and duration of the proposed activities. The Court found that it was reasonable for Ontario to decline to fund a traditional land-use study, as there was no information to suggest that Attawapiskat was making current use of the lands in a way that would be impacted by the proposed mineral exploration activities. There was a family that had been known to lay trap lines in the general area of the proposed activities, but no information about current use, and the Court found that Ontario had no reason to believe that there would be a material cost involved in Attawapiskat communicating with the family to obtain further information.

The ultimate breach of the duty to consult arose from the fact that there had been a breakdown in communication and there were two outstanding issues that had not been addressed when the permits were issued. Attawapiskat had assumed that it was dealing with the proponent on consultation — based on initial communications from the proponent. However, the proponent had not responded to Attawapiskat's communications. The Court found that the Crown did not adequately deal with this issue when it came to its attention several months later and set an unreasonable deadline for Attawapiskat to provide further information.

It also found that the Crown failed to engage in further discussions with Attawapiskat about two outstanding points: (i) Attawapiskat's statement that it was unable to complete sufficient site-specific consultation with members, particularly with the one family with a history of trap lines in the area; and (ii) Attawapiskat's general territorial interest and sovereignty over the area where the activities were to be undertaken.

With respect to the first point, the Court found that the Crown should have asked Attawapiskat to be more specific about what was required for the consultation and then considered the request reasonably. However, the Court noted that no further site-specific information had been provided that would bear on the issuance of the permits, despite having plenty of time to obtain and provide this information. With respect to the second point, the Court found that the First Nation's territorial interest in the project lands was accommodated through an undertaking the proponent provided subsequent to the issuance of the permits, where it agreed to give Attawapiskat notice before going out on the land and drilling.

Although it found that Ontario failed to fulfil its constitutional duty to consult and accommodate, the Court exercised its discretion and declined to quash the permits. The Court concluded that the breach was minor and was something that could have been addressed through conditions and did not go to whether permits should be issued at all. The Court found that it would be unreasonable to require the parties to engage in further consultation given the record before it, including the undertaking to provide notice of drilling activities. The Court seemed to be influenced by the fact that the proposed activities were on undeveloped lands that were remote to the Attawapiskat reserve land and there was no information provided that traditional activities would be affected by the project despite numerous opportunities to provide this information — both before and after the permits were issued.

New Cumulative-Effects Management Agreements With Treaty 8 First Nations

In 2021, the Supreme Court of British Columbia ruled that the B.C. government unjustifiably infringed the treaty harvesting rights of Blueberry River First Nation (Blueberry) through the cumulative effects of provincially authorized industrial development.[8] It held that the B.C. government could not continue to authorize activities that gave rise to further infringements of Blueberry's treaty rights. This case effectively halted provincial permitting in northeastern B.C. while the B.C. government negotiates a path forward with Blueberry and other Treaty 8 First Nations.

In January 2023, the B.C. government announced an implementation agreement with Blueberry on how the "Province and First Nations steward land, water and resources together, and address cumulative effects in Blueberry River's Claim Area."[9] The government has not released the agreement but has indicated it includes C$200 million in funding to support: (i) restoration activities; (ii) the development of new local and watershed level land-use plans; (iii) limits on new natural gas and petroleum developments and a new planning regime for these activities; (iv) protections for old forest and traplines; (v) land protections in Blueberry River's high-value areas; and (vi) wildlife co-management efforts.

B.C. also subsequently announced an agreement with four other Treaty 8 First Nations — Fort Nelson, Saulteau, Halfway River and Doig River First Nations — on "a collaborative approach to land and resource planning."[10] B.C.'s summary of this agreement indicates that it includes some measures similar to the Blueberry agreement (e.g. new land-use plans and protection measures, a new approach to wildlife co-management and restoration funding). It also includes: (i) the development of a new cumulative-effects management system; (ii) pilot projects for shared decision-making for planning and stewardship activities; (iii) a new revenue sharing approach; and (iv) actions to promote education about Treaty 8.

The province is in similar negotiations with the remaining Treaty 8 First Nations in B.C. — McLeod Lake Indian Band, Prophet River First Nation and West Moberly First Nations — and is expected to reach similar agreements with these First Nations.

These agreements are expected to significantly change B.C.'s approach to assessing and managing cumulative effects and land-use planning in Treaty 8 and lead to requests to expand these arrangements to other areas of the province. There is significant overlap in the traditional territories of the Treaty 8 First Nations in B.C. and it remains to be seen how the province will navigate situations where there are differing views of Treaty 8 First Nations on land-use planning and development.

8 *Yahey v. British Columbia*, 2021 BCSC 1287 *[Yahey]*.

9 B.C. News Release, "Province, Blueberry River First Nations reach agreement," available online: https://news.gov.bc.ca/releases/2023WLRS0004-000043.

10 B.C. News Release, "B.C., Treaty 8 First Nations build path forward together," available online: https://news.gov.bc.ca/releases/2023PREM0005-000060.

New Cumulative-Impacts Claims Commenced in Alberta and Ontario

First Nations in Alberta and Ontario have commenced cumulative-impacts claims that are similar to those in the Blueberry claim.

On July 18, 2022, Duncan's First Nation (DFN) filed a statement of claim alleging that the Province of Alberta has breached its obligations to DFN under Treaty 8 by authorizing uses of DFN's traditional territory in a way that "significantly diminishes" the Nation's right to hunt, fish, trap and gather as part of their way of life. The claim, which relates to the same Treaty 8 that was at issue in the Blueberry case, advances many of the same grounds and seeks similar relief, including: (i) claiming that Alberta's mechanisms for assessing cumulative impacts are lacking and have contributed to the breach of its obligations under Treaty 8; (ii) directing the province to establish new mechanisms to assess and manage cumulative impacts of development in consultation with DFN; and (iii) prohibiting Alberta from permitting any activities that further infringe DFN's treaty rights and breach Alberta's fiduciary obligations to DFN.

On September 30, 2022, the Missanabie Cree First Nation, Brunswick House First Nation and Chapleau Cree First Nation filed a legal action against the Ontario government claiming that its management of the province's boreal forests violates James Bay Treaty 9. The claim asserts that the cumulative impacts from various provincially authorized activities (i.e. forestry, mining, energy and agriculture) in their traditional territories have had significant adverse impacts on the health of the boreal forest and Aboriginal and treaty rights. The plaintiff First Nations assert that they no longer have access to sufficient undisturbed lands in their respective traditional territories to carry on their way of life and livelihoods and that their treaty rights have been infringed.

These new cumulative-impacts claims are in addition to similar claims previously commenced by Beaver Lake Cree Nation (Beaver Lake) and Carry the Kettle First Nation (CTK). In 2008, Beaver Lake filed a lawsuit against the Alberta and federal governments, claiming that the cumulative impacts of industrial development within their territory amounted to a breach of Treaty 6. The trial is scheduled for January 2024. In December 2017, CTK filed an action against the Saskatchewan and federal governments, alleging that the authorization of development has prevented CTK members from exercising their rights pursuant to Treaty 4. CTK seeks an injunction preventing Saskatchewan and Canada from authorizing more development on their traditional territory and a declaration that will require the governments to consult CTK prior to authorizing any new development on their territory.

If any of these claims are successful, there will be implications for future permitting in the respective territories.

Canada Releases Indigenous Knowledge Policy Framework

On September 26, 2022, the federal government issued an Indigenous Knowledge Policy Framework for Project Reviews and Regulatory Decisions (Framework) to provide guidance for federal officials implementing the Indigenous knowledge provisions under the *Impact Assessment Act*, the *Canada Energy Regulator Act*, the *Fisheries Act* and the *Canadian Navigable Waters Act*. These statutes require the consideration of Indigenous knowledge — when provided — along with other factors in project reviews and regulatory decisions. These provisions were introduced in light of the long-standing concerns raised by Indigenous groups that Indigenous knowledge was not being given sufficient weight and consideration in project reviews.

The Framework states that there is "no universally accepted definition of Indigenous Knowledge," and that the term describes "complex knowledge systems embedded in the unique cultures, languages, values, and worldviews of Indigenous Peoples." This can include but is not limited to traditional ecological or environmental knowledge and this knowledge is "evolving in the context of contemporary society" and not "relegated to the past."

The Framework articulates five overarching principles to guide federal officials in the consistent and respectful consideration of Indigenous knowledge: (i) respect Indigenous Peoples and their knowledge; (ii) establish and maintain collaborative relationships with Indigenous Peoples; (iii) meaningfully consider Indigenous knowledge; (iv) respect the confidentiality of Indigenous knowledge; and (v) support capacity building relating to Indigenous knowledge. Within each of these principles, the Framework provides further guidelines illustrating how the principles are to be applied, which include direction to:

- respect governance, guidance, protocols, ceremonies and processes relating to Indigenous knowledge and decisions on whether to share Indigenous knowledge;
- engage early with Indigenous Peoples about opportunities to share Indigenous knowledge for project reviews and regulatory decisions and about any conditions for the consideration of Indigenous knowledge;
- consider and not disregard Indigenous knowledge when it is provided for project reviews and regulatory decisions and equally value Indigenous knowledge and western scientific knowledge systems;
- clarify how Indigenous knowledge is to be understood when shared in order to promote an accurate and respectful consideration of Indigenous knowledge;
- communicate how Indigenous knowledge was considered in the outcome of project review or regulatory decisions;
- not use Indigenous knowledge for future decisions without the permission and guidance of knowledge holders; and
- provide capacity support to the extent possible where Indigenous Peoples identify capacity needs relating to the sharing of Indigenous knowledge.

While the Framework directs federal officials to equally value Indigenous knowledge and western scientific knowledge, the Framework does not provide further guidance on resolving any potential conflicts between these knowledge systems or how Indigenous knowledge is best incorporated within the decision-making process. However, this requirement — along with requirements to clarify how Indigenous knowledge is to be understood and to communicate how it was used — will result in greater weight and consideration being given to Indigenous knowledge. Each federal department will still need to develop their own policies that are consistent with the overarching principles of the Framework.

The issues around confidentiality do raise procedural fairness issues for proponents. The Framework indicates that procedural fairness means proponents "*may* have a right … to know what information the decision-maker is relying on when making the decision" and "*may* be given a chance to respond to that information" (emphasis added). While provisions can be put in place to preserve confidentiality, it is unclear in what, if any, circumstances this information would not be shared with proponents — as it would be a breach of procedural fairness for the federal government to rely on Indigenous knowledge in making a decision and not give proponents the opportunity to review and respond to the information.

The Framework applies only to the consideration of Indigenous knowledge in federal decision-making relating to projects. However, similar provincial policies have been released or are being developed. In April 2020, the B.C. Environmental Assessment Office released the Guide to Indigenous Knowledge in Environmental Assessments to provide guidance on supporting the inclusion of Indigenous knowledge in the Environmental Assessment process. Similarly, the Alberta government is developing an Indigenous Knowledge Policy to help guide how government and Alberta Energy Regulator staff can respectfully consider and include Indigenous knowledge in land and natural resource planning and decision-making.

UNDRIP Implementation Updates

B.C. Unveils Action Plan to Implement UNDRIP: In March 2022, the B.C. government unveiled the Declaration on the Rights of Indigenous Peoples Act Action Plan (Action Plan) to support the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP). The Action Plan, which was developed pursuant to B.C.'s *Declaration on the Rights of Indigenous Peoples Act* (DRIPA), details 89 actions to advance the rights of Indigenous Peoples in the province from 2022 to 2027. The details of this action plan include a review of the B.C. mineral tenure regime and are discussed in *B.C. Commits to Modernize Mineral Tenure Regime and other Extensive Actions in UNDRIP Action Plan*.

Federal UNDRIP Action Plan Under Development: On June 21, 2021, the federal *United Nations Declaration on the Rights of Indigenous Peoples Act* (the Act) received Royal Assent. The Act contains two key objectives:

i. To affirm UNDRIP as a universal international human rights instrument with application in Canadian law; and

ii. To provide a framework for the government of Canada to implement UNDRIP.

Similar to the B.C. legislation, the Act does not give immediate legal effect to UNDRIP but provides a framework to align federal laws with UNDRIP over time in consultation and co-operation with Indigenous Peoples. This includes the development of an action plan by June 21, 2023 to achieve the objectives of UNDRIP. The development of the federal action plan is proceeding in two phases, the first of which is underway and is focused on working with Indigenous Peoples to better understand their priorities to help shape the initial draft of an action plan and to begin to identify potential measures for aligning federal laws with UNDRIP. The second phase will focus on continued engagement with Indigenous Peoples to validate the draft action plan and will include opportunities for broader engagement with industry and the provinces and territories. It is currently anticipated that Canada will release a draft of the action plan for public comment in winter/spring 2023.

Article

B.C. Commits to Modernize Mineral Tenure Regime and Other Extensive Actions in UNDRIP Action Plan

Bryn Gray, Alana Robert and Heather Maki

In 2022, the B.C. government unveiled its Declaration on the Rights of Indigenous Peoples Act Action Plan (Action Plan)[1] to support the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP)[2]. The Action Plan details 89 actions to advance the rights of Indigenous Peoples in the province from 2022 to 2027, and was developed pursuant to B.C.'s *Declaration on the Rights of Indigenous Peoples Act* (Declaration Act).[3] Notably, the Action Plan commits to modernizing the *Mineral Tenure Act*[4] in "consultation and co-operation with First Nations and First Nations organizations." The mineral tenure regime is currently the subject of two legal challenges by First Nations raising issues relating to compliance with the duty to consult and UNDRIP.

This article will provide: (i) an overview of the current legal challenges to the B.C. mineral tenure regimes and the B.C. government's commitment to modernize the regime; (ii) a discussion of past duty to consult challenges relating to mineral tenure regimes in other provinces; and (iii) a summary of other significant commitments in B.C.'s Action Plan.

B.C. Mineral Tenure Regime Review and Associated Legal Challenges

The timing of the *Mineral Tenure Act* review is unclear. The B.C. government has not yet publicly announced next steps, despite this commitment being announced in June 2022. This review is expected to include a significant focus on the claim registration system, which grants mineral rights upon registration. As detailed below, this system does not require consultation with Indigenous Peoples prior to registration, but consultation is required for subsequent permitting relating to exploration and development activities.

In the meantime, B.C.'s mineral tenure regime and specific mineral tenures granted thereunder is the subject of judicial reviews by the Gitxaala First Nation (Gitxaala) and the Ehattesaht First Nation, which are scheduled to be heard together in April 2023.

The Gitxaala filed their application for judicial review in the fall of 2021 and are seeking declarations that:

i. the provincial Crown has a duty to consult Gitxaala before granting mineral claims over lands on which Gitxaala asserts Aboriginal title and the Crown breached this duty in granting specific mineral claims without consultation;

ii. B.C.'s system for granting mineral titles has not been implemented in a way that is consistent with the honour of the Crown;

iii. B.C.'s system for granting mineral titles is not consistent with UNDRIP; and

iv. the provincial Crown has a statutory duty to consult and co-operate with Gitxaala Nation on measures necessary to ensure that the B.C. mineral tenure laws are consistent with UNDRIP.

Gitxaala is requesting that the specific mineral claims at issue be quashed or set aside and an injunction suspending the operation of the mineral titles online registry. Gitxaala has pleaded numerous articles in UNDRIP, including provisions relating to obtaining free, prior, and informed consent of Indigenous Peoples. The Ehattesaht First Nation is seeking similar relief in their judicial review, which was commenced in June 2022.

The current B.C. mineral tenure process is made up of two stages in which proponents first acquire mineral title by: (i) electronically "staking" their claim on the Mineral Titles Online system; and (ii) paying a Mineral Claim Registration Fee and Placer Claim Registration Fee.[5] Mining activity[6] then requires second-stage approval under the *Mines Act*.[7] While the second stage may require First Nations engagement, the first stage of acquiring mineral title does not require consultation or notification to First Nation groups.

There are numerous interveners in these applications, including the B.C. Human Rights Commissioner (Commissioner). The Commissioner has indicated that she applied to obtain leave to make legal arguments "about the importance of the Declaration Act as a human rights

1 See British Columbia, Ministry of Indigenous Relations and Reconciliation, "Declaration on the Rights of Indigenous Peoples Act Action Plan" (March 30, 2022), online: https://www2.gov.bc.ca/assets/gov/government/ministries-organizations/ministries/indigenous-relations-reconciliation/declaration_act_action_plan.pdf [*Action Plan*].

2. See United Nations, *UN Declaration on the Rights of Indigenous Peoples*, Resolution 61/295 adopted by the General Assembly on 13 September 2007, online: https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf.

3 S.B.C. 2019, c. 44.

4 R.S.B.C. 1996, c. 292.

5 British Columbia, Mineral & Placer Claims (accessed February 2, 2023), online: https://www2.gov.bc.ca/gov/content/industry/mineral-exploration-mining/mineral-titles/mineral-placer-titles/claims-mineral-placer-titles.

6 "Mining activity" means any activity related to: (a) the search for a mineral or placer mineral; (b) the exploration and development of a mineral or placer mineral; or (c) the production of a mineral or placer mineral *(Mineral Tenure Act, s. 1).*

7 *Mines Act*, R.S.B.C. 1996, c. 293, s. 10; *Mineral Tenure Act*, s. 14.

statute, as part of my mandate to ensure compliance with international human rights law."[8]

It remains to be seen whether the Court will assess and determine compliance of the B.C. mineral tenure regime with UNDRIP, including whether the Court will determine this issue is justiciable. If the Court grants declarations about the legislation's compliance with UNDRIP, there are likely to be more challenges relating to whether other B.C. or federal legislation complies with UNDRIP. The federal government has adopted similar framework legislation to implement UNDRIP over time in consultation and co-operation with Indigenous Peoples.

Previous Consideration of Mineral Tenure Regimes in Yukon and Saskatchewan

The above applications are novel with respect to the relief being sought relating to UNDRIP, but this is not the first time that provincial mineral tenure regimes have been challenged on the basis of the duty to consult. Such challenges have been previously made in both the Yukon and Saskatchewan.

In *Ross River Dena Council v. Government of Yukon*,[9] the Yukon Court of Appeal found that the Yukon "free entry" mineral tenure system was deficient because it failed to provide a mechanism for an appropriate level of consultation with First Nations. Under the "free entry" system, mineral claims were recorded upon receipt of an application that complied with statutory requirements, without any exercise of discretion. The claim holder would then have the ability to carry out a number of exploration activities without obtaining additional permits or approvals and without providing notice to the Crown or First Nations. The Yukon Court of Appeal and chambers judge agreed that the duty to consult applied to the registration of a mining claim. However, the Court of Appeal held that the chambers judge was incorrect in holding that mere notice after the registration of a mining claim was sufficient to fulfil the duty. The Court of Appeal determined that in order for the Crown to meet its constitutional duty to consult, it must develop a regime that provides for consultation commensurate with the nature and strength of the Aboriginal rights or title claim, and with the extent to which proposed activities may interfere with claimed Aboriginal interests.[10]

In contrast, in *Buffalo River Dene Nation v. Saskatchewan (Energy and Resources)*,[11] the Saskatchewan Court of Appeal concluded that the duty to consult was not triggered in circumstances where the Crown had granted exploration dispositions in respect of subsurface oilsands minerals located under Treaty 10 lands. This different result from *Ross River* was driven by differences in the mineral tenure regimes. Unlike the Yukon "free entry" system, the process for issuing mineral tenures in Saskatchewan constitutes two stages: (i) an exploration permit that grants subsurface rights; and (ii) a decision to grant surface access to the lands for exploration and development. The Court of Appeal determined that the Crown decision could not adversely impact treaty rights as this conduct only concerned the *disposition* of mineral rights and was not a decision on the proponent's ability to access or exploit the minerals underlying Treaty 10 lands.[12]

Issues relating to the duty to consult and mineral rights were also recently considered by the Saskatchewan Court of Appeal in *George Gordon First Nation v. Saskatchewan*.[13] In this case, the Court of Appeal rejected an argument by George Gordon First Nation (GGFN), a Treaty 4 First Nation, that Saskatchewan's title to surface and subsurface mineral rights was burdened by "pre-existing treaty rights, including the unfulfilled Treaty No. 4 right to lands and the underlying minerals."[14] GGFN was appealing the dismissal of an action that alleged a breach of the duty to consult relating to the disposition of mineral rights within 100 km of their reserve. GGFN wanted to be notified and consulted on any disposition of mineral rights because they had a right to add additional land to their reserve as a result of a treaty land entitlement settlement. Notably, GGFN was not asserting that the potential exploitation of minerals by third parties would adversely impact their treaty rights, but instead argued that the Crown had a duty to consult prior to disposing of the mineral rights so that GGFN could consider if it wished to obtain those mineral rights for itself. The court concluded

8 British Columbia's Office of the Human Rights Commissioner, B.C.'s Human Rights Commissioner applies for intervenor status in cases that could set important precedent for the interpretation of B.C.'s Declaration Act (December 15, 2022), online: https://bchumanrights.ca/news/intervenor-status-application-regarding-gitxaala-and-ehattesaht-first-nations-and-declaration-act/.

9 2012 YKCA 14, leave to appeal to SCC dismissed (2013 CanLII 59890 (SCC)) [*Ross River*].

10 *Ross River* at para. 7.

11 2015 SKCA 31 [*Buffalo River*].

12 *Buffalo River* at para. 84.

13 2022 SKCA 41 application for leave to appeal to SCC dismissed with costs 2023 CanLII 19734 [*George Gordon*].

14 *George Gordon* at para. 45.

that GGFN's legal and beneficial title to the mineral rights were surrendered under Treaty 4 and Saskatchewan's disposition of mineral rights off-reserve did not engage a potential right or claim of the GGFN and therefore did not trigger the duty to consult. The Court determined that, even if there was a duty to consult, the content of the duty would be at the low end of the spectrum because, inter alia, the Crown decision was "bare mineral disposition, not grants of surface rights or authorizations for surface activity."[15]

Overview of Other Significant Commitments in the B.C. UNDRIP Action Plan

The mineral regime review is only one of many significant commitments made by the B.C. government in the Action Plan, which includes 89 actions across four themes:

1. Determination and inherent right of self-government;
2. Title and rights of Indigenous Peoples;
3. Ending Indigenous-specific racism and discrimination; and
4. Social, cultural, and economic well-being.

The key commitments under each of these areas is detailed further below.

1. Self-determination and Inherent Right to Self-government

These measures aim to ensure that Indigenous Peoples "exercise and have full enjoyment of their rights to self-determination and self-government, including developing, maintaining and implementing their own institutions, laws, governing bodies, and political, economic, and social structures related to Indigenous communities."[16] The B.C. government indicates that it aims to create a province where Indigenous Peoples are supported in their work to "freely determin[e] and implement[] their systems and institutions of government," are recognized and engaged through "predictable relationships," and can exercise self-determination and self-government, including through the "application of their Indigenous laws and legal orders in various areas not adequately addressed through the Canadian legal system."[17]

Some of the key actions under this theme are as follows:

- Establishing a new institution in partnership with the Government of Canada that provides support to First Nations on nation and governance rebuilding, and boundary resolution in accordance with First Nations laws, customs, and traditions (1.1);
- Moving away from short-term transactional agreements to co-developing long-term agreements with Indigenous groups that support reconciliation, self-determination, decision-making, and economic independence (1.2);
- Using ss. 6 and 7 of the Declaration Act to complete government-to-government agreements that recognize Indigenous self-government and self-determination (1.3);
- Co-developing new distinctions-based fiscal relationships that support the operation of Indigenous governments (1.4); and
- Co-developing new distinctions-based policy frameworks for resource revenue-sharing and other fiscal mechanisms (1.5).

These measures could constitute a significant shift in B.C.'s approach to dealing with Indigenous Peoples and the resources available to Indigenous governments to support self-government, including entering into consent-based decision-making agreements with Indigenous nations relating to project and other approvals. The B.C. government announced the first of such agreements in June 2022 with the Tahltan Central Government relating to the environmental assessment for the Eskay Creek Revitalization Project.

15 *George Gordon* at para. 146.

16 Action Plan at p. 10.

17 Action Plan at p. 10.

2. Title and Rights of Indigenous Peoples

These measures seek to ensure that Indigenous Peoples "exercise and have full enjoyment of their inherent rights, including the rights of First Nations to own, use, develop and control lands and resources within their territories in B.C."[18] The B.C. government states that it aims to create a British Columbia where the rights of Indigenous Peoples are respected and co-operatively implemented through treaties, government-to-government agreements, and other constructive agreements.[19] The B.C. government further strives to promote First Nations' benefits from the land and resources in their territories, including by having "access to multiple and diverse streams of revenue to finance their governments and deliver services to their citizens."[20]

The Action Plan indicates that B.C. recognizes the "need to shift from patterns of litigation, and expensive and slow negotiations about title and rights, to co-operative implementation through effective government-to-government relationships."[21]

In addition to the commitment to modernize the B.C. mineral tenure regime, some of the key actions in this area are as follows:

- Co-developing strategic policies and programs to advance collaborative stewardship of the environment, land, and resources, that address cumulative effects and respect Indigenous knowledge, which will be achieved through collaborative stewardship forums, guardian programs, land-use planning initiatives, and other partnerships that support integrated land and resource management (2.6);
- Collaborating with First Nations on sustainable water management and identifying legislative reforms supporting First Nations water stewardship and shared decision-making (2.7);
- Collaborating to develop and implement CleanBC and the Climate Preparedness and Adaptation Strategy to support clean economic opportunities for Indigenous Peoples (2.1);
- Establishing a secretariat dedicated to ensuring that legislation is consistent with the Declaration Act and is developed in consultation and co-operation with Indigenous Peoples (2.1);
- Finalizing the *Draft Principles that Guide the Province of British Columbia's Relationship with Indigenous Peoples*[22] (2.2);
- Negotiating joint decision-making and consent agreements, and making the legislative amendments required to enable these agreements (2.4); and
- Co-developing mechanisms to ensure that the minimum standards of UNDRIP are applied in the implementation of treaties and other agreements with First Nations (2.5).

The explicit reference to cumulative effects in action 2.6 is likely a result of the enhanced focus on cumulative effects following the significant decision in *Yahey v. British Columbia,*[23] in which the B.C. Supreme Court found that the B.C. government had unjustifiably infringed the treaty rights of Blueberry River First Nations through the cumulative effects of provincially authorized industrial development, including the authorization of significant oil and gas and forestry activities over the last several decades. The B.C. government recently announced an implementation agreement with Blueberry — along with agreements with four other Treaty 8 First Nations — to address cumulative-impact concerns, which are discussed in further detail in the case summaries and other developments section of this publication.

18 Action Plan at p. 14.

19 Action Plan at p. 14.

20 Action Plan at p. 14.

21 Action Plan at p. 14.

22 See British Columbia, Draft Principles that Guide the Province of British Columbia's Relationship with "Indigenous People," online: https://www2.gov.bc.ca/assets/gov/careers/about-the-bc-public-service/diversity-inclusion-respect/draft_principles.pdf.

23 2021 BCSC 1287 [*Yahey*]. For further details on this decision see Bryn Gray and Selina Lee-Andersen, "Cumulative Impacts on Treaty Rights Development in Northeastern B.C.," in *Mining in the Courts, Vol XII* and McCarthy Tétrault LLP's *Canadian ERA Perspectives* blog post entitled "BC Supreme Court Rules Cumulative Effects if Industrial Development Infringe Treaty Rights of BC First Nation."

3. Ending Indigenous-specific Racism and Discrimination

The actions in this area aim to ensure that Indigenous Peoples "fully express and exercise their distinct rights, and enjoy living in B.C. without interpersonal, systemic and institutional interference, oppression or other inequities associated with Indigenous-specific racism and discrimination, wherever they reside."[24] The B.C. government states that it aims to create a respectful understanding of the distinct history and rights of Indigenous Peoples among all citizens, and address the overrepresentation of Indigenous Peoples in the justice system, eliminate barriers to accessing health care, address violence and discrimination, promote inclusion in educational institutions, and recognize Indigenous knowledge, laws, and legal orders in decision-making.[25]

Some of the key actions in this area are as follows:

- Introducing anti-racism legislation that addresses Indigenous-specific racism (3.6);
- Developing and implementing community-driven activities to end violence against Indigenous women, girls, and 2SLGBTQQIA+ people (3.8); and
- Prioritizing the implementation of the First Nations and Métis Justice Strategies to reduce the substantial overrepresentation of Indigenous Peoples involved in and impacted by the justice system (3.12 and 3.13).

In advancing action 3.8, the B.C. government will begin by taking action on key commitments made in *A Path Forward: Priorities and Early Strategies for B.C.*,[26] as well as advance a mandate to develop a gender-based violence action plan.[27]

24 Action Plan at p. 18.

25 Action Plan at p. 18.

26 British Columbia, "A Path Forward: Priorities and Early Strategies For B.C.: June 2021 Status Update," online: https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/inquiries/mmiw/mmiwg-status-update.pdf

27 Action Plan at p. 19.

4. Social, Cultural, and Economic Well-being

The actions in this area seek to ensure that Indigenous Peoples "fully enjoy and exercise their distinct rights" and are supported to fully participate in B.C.'s economy. This includes a focus on "ensuring the rights of Indigenous women, youth, Elders, children, persons with disabilities and 2SLGBTQQIA+ people are upheld."[28]

The Action Plan includes a number of desired outcomes, including:

- Governing the economy in a manner that upholds First Nations' title, Indigenous rights, and Indigenous interests, and is led with Indigenous Peoples, where First Nations have "economic opportunities and benefit from the lands and resources in their territories;"[29]
- Indigenous Peoples determine their economic development goals, and "maintain and develop their economic systems … to support self-governance;"[30] and
- Collaboration between B.C. and Indigenous Peoples to "create more inclusive, sustainable and low carbon economics."[31]

Some of the key actions in this area are as follows:

- Establishing a collaborative, whole-of-government approach to partnerships with the Métis Nation, respecting Métis self-determination and establishing more flexible and sustainable funding (4.20);
- Co-developing a policy framework to support repatriation initiatives (4.33);
- Ensuring every First Nation in B.C. has high-speed internet services (4.36);
- Working with the province's Economic Trusts to ensure inclusion of First Nations at a regional decision-making level (4.39);
- Ensuring Indigenous collaboration in the development and implementation of the B.C. Economic Plan (4.40);
- Co-developing economic metrics to evaluate progress on reconciliation (4.42);
- Co-developing recommendations on strategic policies and initiatives for clean and sustainable energy, including by identifying and supporting First Nations-led clean energy opportunities connected to CleanBC, the Comprehensive Review of BC Hydro, and the B.C. Utilities Commission Inquiry on Regulation of Indigenous Utilities (4.43); and
- Advancing a collaborative approach to cannabis-related governance and jurisdiction with First Nations (4.47).

Next Steps

The B.C. government will annually report on its work to implement the Action Plan. Additionally, the Action Plan will be comprehensively updated within five years.

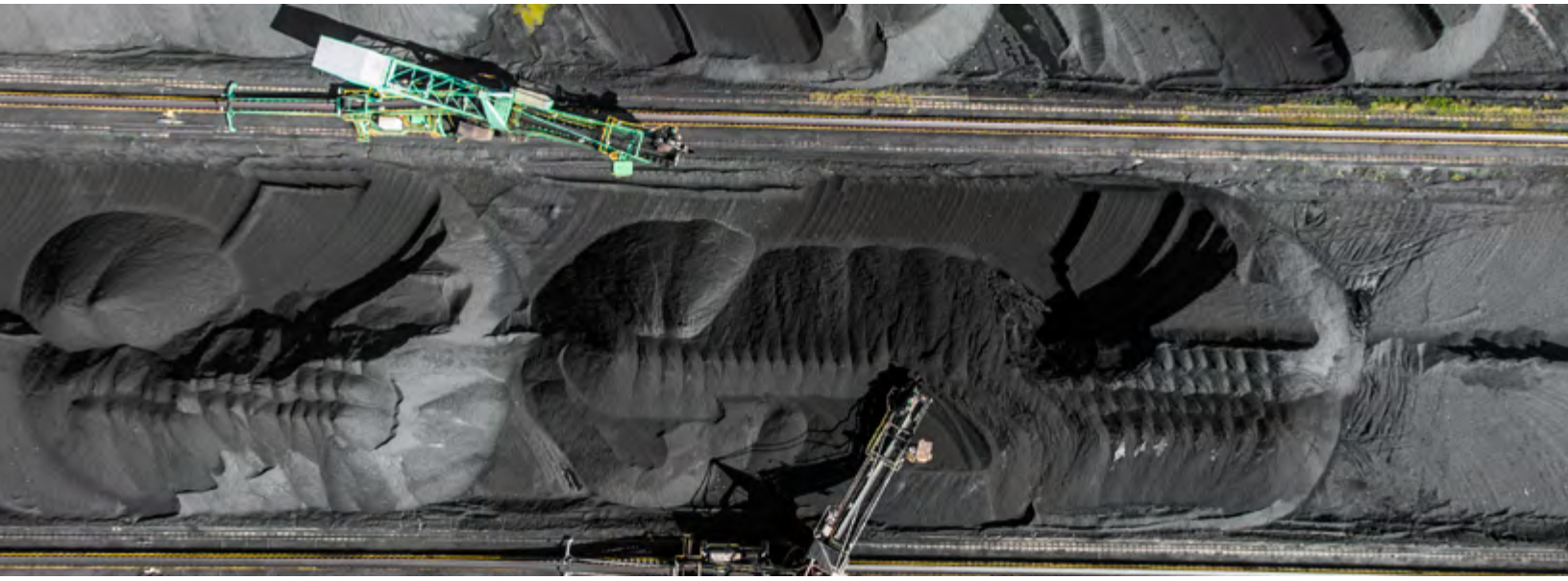
We will continue to monitor developments in B.C. and across the courts, including on the Gitxaala and Ehattesaht challenges described above. Visit McCarthy Tétrault LLP's Canadian ERA Perspectives: Developments in Environmental, Regulatory, and Aboriginal Law blog for the latest developments.

28 Action Plan at p. 22.
29 Action Plan at p. 23.
30 Action Plan at p. 23.
31 Action Plan at p. 23.

Case Law Summaries

Administrative Law

Lindsay Burgess, Charles-Étienne Pressé and Konstantin Sobolevski



Benga Mining Limited v. Alberta Energy Regulator, 2022 ABCA 30

In 2021, a joint review panel (JRP) in its capacity as the Alberta Energy Regulator (AER) denied approval of the Grassy Mountain Steelmaking Coal Project (Project). In this decision, the Alberta Court of Appeal denied the applicants leave to appeal the JRP's decision.

The Project was a proposed open-pit coal mine in southwest Alberta that would have covered 1,521 hectares with a maximum production capacity of 4.5 million tonnes of metallurgical coal over a span of 23 years. In 2017, Benga Mining Limited (Benga), the Project proponent, applied to the AER for approval to construct and operate the mine. In 2018, the AER and Canada's Minister of Environment and Climate Change announced a joint federal-provincial review of the Project and established the JRP to review the Project and issue a decision on behalf of the AER. The JRP conducted its mandate in three stages: (i) review of "pre-panel" materials, including an Environmental Impact Assessment (EIA), amended EIA, and responses to information requests; (ii) a public hearing that spanned 29 sitting days; and (iii) issuance of a written decision (Decision).

The JRP ultimately concluded, among other things, that the Project was likely to result in significant adverse environmental effects. Although all Treaty 7 First Nations stated that they had no objection to the Project, the JRP also found that the Project would adversely affect Indigenous groups that use the Project area, and that there would be significant adverse effects to sites of physical and cultural heritage for three Treaty 7 First Nations. The JRP concluded that the Project was not in the public interest and the AER denied approval of the Project. Benga, the Piikani Nation (Piikani) and Stoney Nakoda Nations (Stoney Nakoda) sought leave to appeal the JRP's Decision (the Applicants).

The Alberta Court of Appeal dismissed the applications for leave, finding that the proposed grounds of appeal either did not raise questions of law or jurisdiction, or had no arguable merit. Specifically, the Court found, among other things, that: (i) Benga was not denied procedural fairness by the JRP's finding that Benga submitted insufficient information — while the JRP reserved the right to request additional information further to a

completeness determination letter, it was not required to do so; (ii) contrary to Benga's assertion otherwise, the JRP considered the Alberta government's *South Saskatchewan Regional Plan*; (iii) Benga's proposed grounds of appeal — that the JRP overlooked or mischaracterized evidence and failed to consider rules of expert evidence and reliability — did not raise a question of law; and (iv) the JRP's finding that Benga's satisfaction of the Mine Financial Security Program was inadequate was a finding of fact, on which appellate review was not permitted.

The Applicants also claimed that the JRP failed to consider how a decision not to approve the Project would affect the Stoney Nakoda and Piikani. The Court denied these grounds of appeal after finding the JRP had considered the effects of the Project on the two applicants and Indigenous groups more generally. Furthermore, the Applicants were all granted full participation rights in the hearing, and there was no arguable merit that the JRP had to seek out further information about the implications of non-approval. Finally, the Court rejected the Applicants' argument that the JRP failed to consider potential positive effects of the Project. On the contrary, it was clear from the face of the decision that these were considered.

Leave to appeal to the Supreme Court of Canada was refused: 2022 CanLII 88683.

Mine Jeffrey inc. v. Procureur général du Québec (Ministre de l'Énergie et des Ressources naturelles), 2021 QCCQ 12054 and 2022 QCCA 427

In this case, the Court of Québec held that a decision (Decision) of the Québec Minister of Energy and Natural Resources (Minister) requiring Jeffrey Mine Inc. (Jeffrey) to pay a financial guarantee of C$2,135,275 for the approval of the revision of the redevelopment and restoration plan (RRP) for a mine site was in compliance with the Québec *Mining Act* (Act).

Until 2012, Jeffrey operated an asbestos mine for which it had obtained mining rights from the Government of Québec. Following the Minister's decision to cease the mining of asbestos in Québec, the parties agreed to a C$41 million indemnity payable to Jeffrey in consideration for the abandonment of its mining rights, its undertaking to proceed with the redevelopment and restoration of the mining site, and to ensure its security, in accordance with applicable environmental regulations (Agreement).

Following the submission by Jeffrey of a revised RRP for approval, the refusal by the Minister to approve such revised RRP, and many exchanges between the parties about these issues, the Minister issued the Decision. Before the Court of Québec, Jeffrey argued, among other things, that: (i) the Agreement removed the Minister's ability to use the Act to require the payment of a financial guarantee, and (ii) the Minister had taken too long to require Jeffrey to provide a financial guarantee. The Court of Québec disagreed, holding that the Decision was in compliance with the Act because: (i) the RRP needs to be approved in accordance with the Act and the power of the Minister to issue such a decision is discretionary, and (ii) there is nothing in the Act that limits the time period for the Minister to request a financial guarantee.

Jeffrey sought leave to appeal the Court of Québec's decision. The Court of Appeal denied leave on the grounds that, among other things, the appeal had no reasonable chance of success. The Court of Appeal further reiterated that the obligation to redevelop and restore the mine site remains in effect until the work has been completed or until the Minister issues a certificate under s. 232.10 of the Act releasing Jeffrey from its obligations.

Mount Polley Mining Corporation v. Environmental Appeal Board, 2022 BCSC 1483

In this decision, the British Columbia Supreme Court dismissed Mount Polley Mining Corporation's (Mount Polley) appeal from an administrative monetary penalty determination under the B.C. *Environmental Management Act* (EMA).

Mount Polley operates an open pit copper and gold mine near Likely, B.C. (Mine). Since 1997, Mount Polley has held a permit issued under the EMA to discharge treated effluent from the Mine (Permit). After the tailings dam failure in 2014, the Mine was closed for a period of time. In 2015, the Permit was amended to include a short-term water management plan, and a two-year temporary authorization to discharge to Quesnel Lake. In 2017, s. 2.10 of the Permit was amended to impose obligations on Mount Polley to design and test systems to treat "mine influenced" water. In May 2018, October 2018 and April 2019, the Ministry of Environment and Climate Change Strategy (Ministry) inspected the Mine and issued warning letters to Mount Polley that it was out of compliance with s. 2.10 of the Permit. On May 14, 2019, prior to the third warning letter, Mount Polley applied to amend ss. 2.8, 2.9, and 2.10 of the Permit. The Permit was amended on February 1, 2020 and the requirements and deadlines set out in s. 2.10 were replaced.

On December 8, 2020, the Director issued an administrative penalty (Penalty) for Mount Polley's failure to comply with s. 2.10 of the Permit of C$9,000. In setting the amount of the Penalty, the Director determined that the contravention was major, but the actual or potential adverse effect of the contravention was low. Mount Polley appealed the Penalty to the Environmental Appeal Board (Board), arguing that it was impossible to comply with certain terms of s. 2.10 and that the Director erroneously characterized the non-compliance as major. The Board dismissed the appeal. In doing so, the Board held that the defence of impossibility was not available as a consideration in determining compliance with s. 2.10 of the Permit (although due diligence is considered when determining the amount of the penalty). Mount Polley brought an application for judicial review of the Board's decision.

The Court dismissed Mount Polley's application, finding that the Board reasonably concluded that compliance with s. 2.10 was not impossible. The Board's analysis of this issue was transparent, intelligible and fell within a range of defensible and reasonable outcomes. The Court then went one step further and held that the Board's decision was correct, on the basis that the common law defences of impossibility and due diligence apply in the penal context, but not under the absolute liability administrative penalty scheme of the EMA. The Court also found the Board's determination that the contravention was "major" was reasonable. The specific obligations set out in s. 2.10 of the Permit were not mere reporting obligations, as suggested by Mount Polley, but rather required it to undertake certain steps in furtherance of the development and implementation of treatment processes by specific dates. The Board's characterization of the contravention as major on the basis it undermined the integrity of the regulatory regime was reasonable.

Victoria Gold (Yukon) Corp v. Yukon Water Board, 2022 YKSC 46

In this decision, the Supreme Court of Yukon granted an application by Victoria Gold (Yukon) Corp. (Victoria Gold) to stay an order that it provide security in excess of C$36 million to the Yukon Water Board (Water Board) pending the outcome of an appeal.

Victoria Gold owns and operates the Eagle Gold Mine in the Yukon. It holds a quartz mining licence and a water use licence. The Government of Yukon (Yukon) may order Victoria Gold to provide security under the quartz mining licence for proper closure of the site once the mining project is completed or in the event the mine is abandoned. The Water Board has authority to order security under the water licence. On June 17, 2022, the Water Board ordered Victoria Gold to furnish security in the amount of C$104,903,628 *inclusive* of any amount ordered as security by Yukon. On June 27, 2022, Yukon ordered Victoria Gold to furnish security in the amount of C$68,662,300. The result is that the Water Board requires Victoria Gold to furnish security over C$36 million (Additional Security) in addition to the security ordered by Yukon. Victoria Gold sought leave to appeal the Water Board's security order, as well as a stay of a requirement that it pay the Additional Security pending the outcome of the appeal.

As an initial matter, the Court granted the Water Board standing on Victoria Gold's stay application. In doing so, however, the Court noted that the Water Board's submissions were overly adversarial and warranted caution. The Court granted Victoria Gold's stay application. The Water Board argued that Victoria Gold had violated the terms of its water licence and so did not come to court with clean hands. On this basis, it urged the Court to dismiss the application without considering the merits. The Court rejected the Water Board's position. Victoria Gold appealed the Water Board's order on the basis it made errors of fact that amounted to errors of law and infringed the procedural fairness that it owed Victoria Gold. The Court found that Victoria Gold's compliance with the terms of the water licence is irrelevant to those issues.

The Court applied the three-part test for granting a stay set out in *RJR-MacDonald,*[1] finding that there was a serious question to be tried, Victoria Gold would suffer irreparable harm if a stay was not ordered and that the balance of convenience favoured granting a stay. With respect to the latter, the Court found that the public interest would still be protected if a stay was ordered. In this regard, the more than C$68 million in security assessed by Yukon would remain in place as would regulatory oversight to ensure the mine operates safely. Also no risks of closure, abandonment, or significant adverse effects that require immediate reclamation had been identified.

1 *RJR-MacDonald Ltd. v. Canada (Attorney General),* [1994] 1 SCR 311.

Case Law Summaries

Arbitration

Lindsay Burgess

MDG Contracting Services Inc. v. Mount Polley Mining Corporation, 2022 BCSC 1078

In this decision, the Supreme Court of British Columbia declined to grant leave from, or set aside, an arbitral award finding MDG Contracting Services Inc. (MDG) liable to Mount Polley Mining Corporation (Mount Polley) for breach of contract due to overbilling, failing to complete the scope of work and misrepresentations contained in its response to a Request for Proposal (RFP).

In November 2017, MDG and Mount Polley entered into an agreement under which MDG agreed to provide dredging work to remove tailings from an area within the Mount Polley Mine (Agreement). The work did not go as planned, a dispute arose, and ultimately the work was not completed. Mount Polley terminated the Agreement for cause. MDG alleged Mount Polley made negligent representations and wrongfully failed to disclose relevant information to MDG regarding the tailings, and it commenced an action against Mount Polley alleging breach of contract and misrepresentation. Mount Polley counterclaimed for breach of contract. Questions about liability in the dispute were arbitrated, and a partial final award was issued on October 20, 2021 (Award) in which the arbitrator found MDG liable to Mount Polley. By agreement, damages will be assessed in the next phase of the arbitration.

MDG brought an application seeking leave to appeal from the Award pursuant to s. 31 of the *Arbitration Act*, and to set aside the Award pursuant to s. 30 of the Act.

In its application, MDG alleged that the arbitrator made numerous errors of law and committed arbitral error by failing to observe the rules of natural justice in failing to set out his reasoning in respect of his conclusion that MDG owed a duty of care to Mount Polley. The Court denied MDG's application.

On the issue of leave to appeal, the Court considered whether MDG had met the threshold requirement of identifying a question of law arising from the Award. First, with respect to the issue of whether Mount Polley was liable to MDG for negligent misrepresentation, MDG argued that the arbitrator erred in law by: (i) misapplying the duty of care analysis; (ii) misstating and misapplying the law on when an omission may constitute a misrepresentation; and (iii) failing to consider the elements of reliance in respect of MDG's misrepresentation by omission claim. However, the parties agreed that the arbitrator set out the correct test for establishing negligent misrepresentation. Essentially, MDG's argument was that the unaltered legal test, when applied by the arbitrator, should have resulted in a different outcome. The Court found that the issues raised by MDG related to whether the facts satisfied the legal test for misrepresentation, which is a question of fact or mixed fact and law. As such, the threshold requirement for leave was not met with respect to the misrepresentation claims.

Next, the Court considered whether the arbitrator had erred in law by misapplying the legal test for the duty of good faith honest performance by improperly limiting the scope of the duty to statements in the RFP documents. In this regard, MDG alleged that it alerted Mount Polley to difficulties it was having in dredging the tailings, and Mount Polley continued to withhold relevant information from MDG. However, the Court found that the arbitrator did indeed consider this allegation and found no evidence of bad faith on the part of Mount Polley. Again, the threshold for leave was unmet as MDG was arguing that, despite correctly stating the law, the arbitrator should have, in properly applying the law, reached a different outcome (which is a question of mixed fact and law).

Finally, the Court declined MDG's request to set aside the Award. MDG alleged the arbitrator committed an arbitral error by failing to set out his chain of reasoning for the conclusion that MDG owed a duty of care to Mount Polley. The Court disagreed, finding that the Award contained "ample detail" with respect to the arbitrator's findings, consideration of authorities, and reasoning. MDG's application was dismissed, with costs to Mount Polley.

Enrroxs Energy and Mining Group v. Saddad, 2022 BCSC 285

In this decision, the Supreme Court of British Columbia recognized and enforced an arbitral award made in Geneva, Switzerland under British Columbia's *International Commercial Arbitration Act* (ICAA) and *Foreign Arbitral Awards* Act.

Nader Saddad (Saddad) is a Canadian and Iranian national and engineer in the oil and gas industry. Michel Pacha (Pacha), a French national resident in Geneva and the United Arab Emirates, is the sole shareholder and director of the petitioner, Enrroxs Energy and Mining

Group (Enrroxs). In 2014, Saddad and Pacha entered into a business relationship in the upstream oil and gas sector. Pacha would provide funds, while Saddad would provide expertise and contacts. They incorporated a company, Caspian Energy Solutions (Caspian). Initially, Saddad was the sole shareholder and sole director of Caspian. Pacha and Saddad entered into a number of agreements including a memorandum of understanding, a letter of undertaking (LOU), and two loan agreements (collectively, the Agreements), all of which contained a forum selection and choice of law clause requiring all disputes to be arbitrated in Switzerland according to Swiss law. Under the LOU, Saddad agreed to resign and forfeit his shares in Caspian (Shares) upon a breach of the LOU. Enrroxs advanced funds to Saddad under the loan agreements, and Saddad purchased oil and gas equipment (Equipment).

By April 2015, Pacha felt that the project was not proceeding in accordance with the Agreements, and he transferred the Shares to himself, as security, citing the LOU. Pacha filed numerous civil and criminal charges against Saddad in Dubai. In February 2017, the Dubai Court dismissed the criminal charges. In 2017, Enrroxs initiated arbitral proceedings against Saddad in Switzerland seeking repayment of various loans. Saddad participated fully in the Swiss proceedings. On January 28, 2020, the Swiss arbitrator issued his award (Swiss Award), finding Saddad liable for the amounts under the loan agreements and directing him to pay Enrroxs approximately $4.8 million.

On August 30, 2020, Saddad commenced a claim in the Dubai Court against Enrroxs and others seeking a declaration that he owned the Equipment, which he valued at approximately C$2.56 million, and compensation for lost profits while Enrroxs held the Equipment. On June 16, 2021, the Dubai Court confirmed that Saddad was the owner of the Equipment but dismissed his claim for damages. The decision was confirmed on appeal. In November 2020, Enrroxs filed the within petition seeking recognition and enforcement of the Swiss Award by the B.C. Court and obtained an *ex parte Mareva* injunction against Saddad.

The Court recognized and enforced the Swiss Award. In doing so, the Court noted that s. 35(1) of the ICAA, which is modelled after the *UNCITRAL Model Law on International Commercial Arbitration*, requires the court to recognize the award unless the award debtor can establish that a specific s. 36 exception applies. Under s. 36(1)(b)(ii) of the ICAA, the court can refuse domestication of an award if it finds it would be contrary to public policy. However, the public policy exception is focused on the integrity and fairness of the foreign arbitral process and the laws on which the award was based, not on post-arbitral domestic enforcement matters. The Court determined that Saddad fell short of establishing the high threshold required to show that registration of the Swiss Award would offend public policy. The Court considered the fact that the parties agreed to have disputes determined by Swiss arbitration. In addition, the appropriate time to raise substantive issues about valuation and set-off was before the Swiss arbitrator or the Dubai Court. Saddad also failed to show that domestic recognition and enforcement would result in double recovery. Finally, the Court denied Saddad's alternative claim for a stay of execution pending valuation, as there was no precedent on analogous facts on which to ground such a claim.

Case Law Summaries

Bankruptcy and Insolvency

Ashley Bowron

Centerra v. Entes Industrial, 2022 ONSC 4720

In this decision, the Ontario Superior Court approved a plan of arrangement, finding that the unsecured creditors did not have standing to oppose the arrangement.

Centerra Gold Inc. (Centerra) is a Canadian-based mining company. Its flagship asset is the Kumtor gold mine located in the Kyrgyz Republic (Republic), which it owns through its wholly owned subsidiary, Kumtor Gold Company CJSC (KGC). In May 2021, Mr. Bolturuk, on behalf of the Republic, seized control of the project and wiped out C$1 billion of shareholder value in one day. Centerra commenced international arbitration proceedings against the Republic and Kyrgyzaltyn JSC (KZN), a company owned by the Republic, as well as proceedings in the U.S. against Mr. Bolturuk. KZN owns 26% of the shares in Centerra and has two seats on its board. In November 2021, Centerra reached an agreement in principle with KZN and the Republic pursuant to which, among other things, Centerra would repurchase its shares from KZN, cancel them, and transfer its ownership in KGC to KZN (Arrangement). The Arrangement was formally entered into on April 4, 2022 and approved by the Republic.

The Arrangement was opposed by two unsecured creditors who owned judgments against the Republic: Entes Industrial Plants Construction (Entes) and Gebre LLC (Gebre) (together, the Creditors). The Creditors argued that the Arrangement was devised for a legitimate business purpose but was intended to thwart their interests as creditors. The Creditors sought to block the Arrangement so that the KZN shares in Centerra would be available to satisfy their arbitral awards against the Republic or to have the sheriff of the City of Toronto garnish payments that Centerra is required to make under the Arrangement.

The Court approved the Arrangement, finding that the requirements set out in *BCE*[1] had been met. In doing so, the Court rejected Gebre's argument that the Arrangement was not an "arrangement" under the *Canada Business Corporations Act* (Act) in that no merger or acquisition was contemplated, and Centerra's shareholders' rights were not being arranged. Rather, the Court found that the exchange of KZN's shares in Centerra for consideration and shares of KGC was an "arrangement" as it was an "exchange of securities for money or securities of another corporation" under s. 192(1)(f) of the Act. The Court also rejected Gebre's argument that the transactions contemplated by the Arrangement could be achieved outside the Act, finding that the Arrangement was a "convenient and practical way of effecting the required severance of ties with the Republic and KZN."

The Court further held that the Creditors did not have standing to oppose the Arrangement because they did not have contractual, secured or shareholding rights in Centerra. In this regard, the Court found that the Creditors can only execute on their judgments against the Republic directly. The Court also commented that even where contractual counterparties had legal rights that were negatively affected by an arrangement, courts have nevertheless approved the arrangement. As held in *Protiva Biotherapies Inc. v. Inex Pharmaceuticals Corp.*,[2] "third parties cannot use their rights to veto arrangements in a manner that is disproportionate to the value of their rights."

Pandion Mine Finance Fund LP v. Otso Gold Corp, 2022 BCSC 136

In this decision, the Supreme Court of British Columbia appointed a receiver over Otso Gold Corp's (Otso) assets and undertaking.

Otso owns mineral rights in British Columbia and, through subsidiaries, in Finland. In December 2021, Otso was granted protection from creditors under the *Companies' Creditors Arrangement Act*. Pandion Mine Finance Fund LP (Pandion) is Otso's only secured creditor. While the amount owing to Pandion is disputed — around US$26 million or over US$95 million — there is no dispute that Otso is in default and unable to pay. Pandion brought the within application for appointment of a receiver.

1 *BCE Inc v. 1976 Debentureholders*, 2008 SCC 69.

2 2007 BCCA 161.

The Court determined that it was just and convenient to appoint a receiver on certain terms, and that Pandion was not limited to an interim receivership order. On the latter issue, Otso and its majority shareholder, Brunswick, argued that, as Pandion had not yet given notice to Otso in the manner contemplated by s. 244 of the *Bankruptcy and Insolvency Act* (BIA), it was limited to appointment of an interim receiver under s. 47 of the BIA. The Court disagreed, finding it was appropriate to make a receivership order under s. 243(1) of the BIA on the basis Otso had much more than 10 days of at least informal notice, and neither Otso nor Brunswick were prejudiced by the lack of notice.

The Court also held that it was just and convenient to appoint a receiver on the basis of its findings, among other things, that: (i) a continuing expenditure of funds was necessary to preserve the mine's value; (ii) appointment of a receiver would facilitate the preservation and orderly marketing of the mine for the benefit of all Otso's creditors; (iii) a court-appointed receiver is objective and neutral; (iv) Otso did not oppose the appointment of a receiver *per se*; and (v) Pandion was not seeking appointment in bad faith. The Court added supplemental terms to the receivership order that included, among other things, a requirement that the receiver seek court approval of asset sales in excess of certain thresholds.

In a related decision, 2022 BCSC 1923, the Court referred an application brought by the receiver to approve the legal fees charged by its counsel to the registrar. Specifically, the Court held that the fees were unreasonable due to the discrepancy between the rates charged for junior and senior counsel, junior counsel's rate being too high in comparison to senior counsel. The Court found that a billing practice where a newly called lawyer is valued at two-thirds of the time spent by a lawyer of 15 years' experience practising in a specialized field is clearly unreasonable.

Peace River Hydro Partners v. Petrowest Corp., 2022 SCC 41

In this decision, the Supreme Court of Canada (SCC) held that courts may refuse to stay a receiver's civil proceedings in favour of an arbitration agreement in circumstances where arbitration would compromise the orderly and efficient conduct of parallel receivership proceedings under the *Bankruptcy and Insolvency Act* (BIA).

Peace River Hydro Partners (Peace River) is a partnership that was formed to build a hydroelectric dam in British Columbia. Peace River subcontracted work to Petrowest Corporation (Petrowest), an Alberta-based construction company, and its affiliates. The parties executed several clauses providing that disputes arising from their relationship were to be resolved through arbitration (Arbitration Agreements). When Petrowest encountered financial difficulties, the Alberta Court of King's Bench granted an order appointing a receiver (Receiver) to manage the assets and property of Petrowest and its

affiliates, pursuant to s. 243 of the BIA. The Receiver then commenced a civil claim against Peace River in the Supreme Court of British Columbia seeking to collect funds allegedly owed to Petrowest and its affiliates for the subcontracted work. Peace River applied under s. 15 of British Columbia's *Arbitration Act* for a stay of proceedings on the ground that the Arbitration Agreements governed the dispute. The chambers judge dismissed the stay application. The British Columbia Court of Appeal upheld the chambers judge's decision. Peace River appealed to the SCC.

The SCC dismissed Peace River's appeal, finding that, despite the prerequisites for a mandatory stay under s. 15(1) of the *Arbitration Act* having been met, "enforcing the Arbitration Agreements would compromise the orderly and efficient resolution of the receivership, contrary to the purposes of the BIA." Section 15 of the *Arbitration Act* does not require a court, in every case, to stay a civil claim brought by a court-appointed receiver where the claim is subject to a valid arbitration agreement. A court may decline to grant a stay where the party seeking to avoid arbitration establishes that the arbitration agreement at issue is "void, inoperative or incapable of being performed" within the meaning of s. 15(2). In the context of a court-ordered receivership, an arbitration agreement may be inoperative if enforcing it would compromise the orderly and efficient resolution of the receivership.

The determination of whether a stay of proceedings should be granted in favour of arbitration is guided by a two-part framework: (i) the technical prerequisites for a mandatory stay of court proceedings; and (ii) the statutory exceptions to a mandatory stay of court proceedings. The applicant for a stay in favour of arbitration must establish the technical prerequisites for a stay. If the applicant discharges this burden, then the party seeking to avoid arbitration must show that a statutory exception applies.

Peace River established that all technical prerequisites for a mandatory stay were met. The Receiver established that the otherwise valid Arbitration Agreements were inoperative in the context of insolvency proceedings. In coming to this finding, the majority considered the following factors: the effect of arbitration on the integrity of the insolvency proceedings; the relative prejudice to the parties caused by resolving the dispute via arbitration; the urgency of resolving the dispute; the applicability of a stay of proceedings under bankruptcy or insolvency law; and any other factor the court considers material in the circumstances.

For more on this decision, see McCarthy Tétrault LLP's Restructuring Roundup blog post entitled "The single proceeding model v arbitration: the Supreme Court of Canada weighs in in Petrowest."

Ward Western Holdings Corp. v. Brosseuk, 2022 BCCA 32

In this decision, the British Columbia Court of Appeal upheld an order appointing a receiver and manager over Westrike Resources Ltd. (Westrike) under the *Law and Equity Act*. Westrike owns permits and mining claims for a placer gold mine located near Revelstoke, British Columbia (Mine).

In June 2020, Ward Western Holdings Corp. (Ward Western), purchased Westrike from the vendors (Vendors) for C$6.5 million pursuant to the terms of a share purchase agreement (SPA). The purchase price was financed by C$4.5 million in vendor take-back financing (Vendor Loan), which was secured by a general security agreement (GSA) granted by Westrike. The SPA provided that one of the Vendors, Raymond Brosseuk, would have absolute authority over mining operations until the mine produced gold having a value of at least C$1,812,500 after operating costs, the sale of which would be used to pay, among other things, the Vendor Loan. Ward Western had the right to make a cash payment of any or all of the C$1,812,500. Once the amount had been realized, either through gold production or a cash payment from Ward Western, authority over the mining operations would transfer to Ward Western.

The Mine commenced operations on July 15, 2020, but the relationship between the parties quickly deteriorated. On July 29, 2020, Mr. Brosseuk's access to the Mine was restricted. On September 2, 2020, Westrike commenced mining operations without Mr. Brosseuk's knowledge, consent or involvement. That same day, the Vendors sent Ward Western a demand for payment in full of the C$4.5 million indebtedness and alleged various breaches by Ward Western. Pursuant to the terms of the GSA, the Vendors appointed a receiver (Receiver) over all of the tangible and intangible property and assets of Westrike. Ward Western and Westrike denied the authority of the Receiver without a court order and sought an interlocutory injunction to enjoin the respondents from interfering with the Mine. The respondents opposed the injunction application and brought a cross-application for a court-appointed receiver and manager of Westrike.

The judge dismissed the injunction application and ordered the appointment of the Receiver. Ward Western and Westrike sought leave to appeal both orders, however, the Court of Appeal only granted leave with respect to the order appointing the Receiver, finding that the issue of appointment of a receiver under the *Law and Equity Act* — where there is a dispute over the existence of a breach — was of importance to the profession.

The Court of Appeal dismissed the appeal, finding that the judge's order was entitled to deference and no error in principle in the judge's exercise of discretion had been identified. Although an underlying debt was in dispute, there were uncontested breaches of the SPA and GSA by the appellants. Specifically, the appellants failed to: (i) pay the legal fees of the respondents as required under the GSA; (ii) pay Mr. Brosseuk's advisory fees; (iii) account to the respondents for the gold produced and sold; and (iv) pay the insurance premium for Westrike's equipment. The Court found that these breaches, individually and in combination, "supported a real concern for the protection or safeguarding of the Vendors' assets." In addition, the appellants' behaviour suggested that they did not intend to operate the mine in an open and transparent manner or that they would now adhere to their various obligations. As such, the Court concluded that it was open to the judge to find that appointment of a receiver would advance the interests of justice and convenience.

Yukon (Government of) v. Yukon Zinc Corporation, 2022 YKSC 2 and 2022 YKSC 58

We reported on the ongoing court-supervised receivership of the Wolverine Mine in *Mining in the Courts, Vol. XI* and *Mining in the Courts, Vol. XII*. In these decisions, the Supreme Court of Yukon made orders approving the sale of certain mineral claims to Almaden Minerals Ltd. (Almaden), terminating the sale and investment solicitation plan (SISP), and amending the receivership order (Order) to reflect the transition of care and maintenance activities to a contractor with the Yukon government. While these applications were unopposed, these orders are significant steps in the history of this litigation.

As previously reported, Yukon Zinc Corporation (Yukon Zinc), owned and operated the Wolverine Mine in the Yukon (Mine), the underground portion of which flooded in 2017. The Yukon government (Yukon) increased the amount of the security required under Yukon Zinc's mining licence (Remediation Security) from C$10 million to over C$35 million. Yukon Zinc failed to pay this increase. In July 2019, Yukon commenced proceedings under s. 243 of the *Bankruptcy and Insolvency Act* (BIA), and when Yukon Zinc failed to file a proposal to its creditors by the deadline, it was deemed to have made an assignment into bankruptcy. A receiver was appointed (Receiver).

The Receiver developed the SISP, which was approved by the Court on May 26, 2020, and later confirmed on appeal. The sale process began in April 2021. Several binding bids were received by July 2021. However, after evaluating the bids, the Receiver ultimately concluded that no bid could result in a viable sale of substantially all of Yukon Zinc's assets. After consultation with Yukon, the Receiver advised the relevant stakeholders that the sale process would be terminated. The Receiver further determined that the preferred approach was to transfer the care and maintenance of the Mine to Yukon. In June 2021, the Receiver had received a binding bid from Almaden for a small portion of Yukon Zinc's assets, known as the Logan interests. Under a joint venture agreement with Yukon Zinc, Almaden had a 40% interest in the Logan interests, and since offered to purchase the Debtor's 60% interest. The Receiver entered into a purchase and sale agreement with Almaden for this purpose, subject to court approval.

On the Receiver's unopposed applications in 2022 YKSC 2, the Court approved the sale to Almaden and terminated the SISP. The Court found that the Receiver had made extensive efforts to obtain the best price for the assets being sold, and that there was no evidence of any improvident actions by the Receiver. The Court found that the SISP process had been approved as fair and was followed honestly by the Receiver.

In 2022 YKSC 58, Yukon sought to amend the Receivership Order to reflect the Receiver's reduction of activities as care and maintenance were to be transferred to a contractor with Yukon effective November 1, 2022. The question for the Court was whether the Receiver fulfilled its mandate set out in the Receivership Order, including care and maintenance and related operational activities. It was appropriate for the Receiver to be released from the discharged powers to focus their activities on general receivership duties and provide assistance in the early stages of the transition.

Article

Reverse Vesting Orders: Exceptional but Still Possible

Erinn Wilson and Walker MacLeod

In *Harte Gold Corp. (Re)*,[1] the Ontario Superior Court of Justice (Commercial List) granted a reverse vesting order (RVO), pursuant to which the debtor, Harte Gold Corp. (Harte Gold), was acquired by way of credit bid by one of Harte Gold's primary secured creditors. In this decision, Justice Penny reminded the insolvency industry that RVOs have been and continue to be an exceptional remedy and provided further clarification on when such remedy is appropriate.

Introduction

In a typical vesting order obtained during an insolvency proceeding, the debtor's assets are transferred to a third-party purchaser free and clear of all encumbrances. An RVO, on the other hand, involves the shares of the debtor company being purchased in a transaction where unwanted liabilities and assets are transferred, assigned, and vested to a separate entity, typically a holding company (Holdco), while leaving desired assets and liabilities with the debtor company. The debtor company then emerges from the insolvency proceeding with the purchaser's desired assets, and the Holdco remains to finalize its restructuring or wind-down under the applicable insolvency statute. RVOs are typically used over a standard vesting order where there is value in the debtor company's corporate entity (for instance in the case of tax losses or other benefits which are not otherwise capable of being monetized in a traditional asset liquidation) or in situations where leaving desired assets with the debtor company provides significant practical benefits (such as in the case of heavily regulated industries where necessary approvals and licence transfers are costly, difficult, or impractical, such as in the resource extraction sector).

In 2015, the Ontario Superior Court of Justice granted the first RVO outside of a plan of arrangement in *Re Plasco Energy Group Inc. et al*.[2] Since then, RVOs have been increasingly granted by Canadian Courts in both uncontested and contested hearings. Notably, as we reported in *Mining in the Courts, Vol. XI*, in *Nemaska Lithium inc., Re (Nemaska Lithium)*,[3] the Superior Court of Québec granted an RVO in a contested application.

While RVOs have been increasingly granted in Canada since 2015, there has been limited guidance on when such relief is justified and varying judicial opinion regarding the basis for the Court's jurisdiction. Janis Sarra has recently noted in her article "Reverse Vesting Orders – Developing Principles and Guardrails to Inform Judicial Decisions" that, to date, the majority of RVO transactions have been approved by the courts without any written reasons mainly due to the uncontested nature of the proceeding or, where the RVO is contested, the written decisions have focused on the court's jurisdiction to provide such relief.[4]

RVOs have been widely recognized as a novel tool in insolvency proceedings. However, given their increasing use in complex insolvencies in Canada, questions about whether this relief is truly novel or simply the norm, have now arisen.

As such, *Harte Gold* is an important decision with regard to RVOs for two main reasons. First, Justice Penny's written decision assists in filling in some of the gaps in the current case law with respect to the key factors a Court should consider when granting an RVO and further clarifies the Court's jurisdiction to grant RVOs pursuant to the *Companies' Creditors Arrangement Act* (CCAA).[5] Second, the Court in *Harte Gold* reiterates the exceptional nature of this relief, thereby, truncating any suggestions or sentiments that RVOs have now become the norm instead of novel.

Context

Harte Gold is a publicly traded company that operates a gold mine located in northern Ontario which produced gold bullion. Harte Gold filed for CCAA protection in December 2021. Harte Gold obtained and maintained 36 permits and licenses that are required for operating the mine and allowed for the performance of exploration work on the property. At the time of filing, Harte Gold also had 513 mineral tenures, consisting of three freehold properties, seven leasehold properties, 468 mineral claims, and 35 additional tenures.

Prior to filing and in an effort to address its ongoing liquidity issues, Harte Gold conducted a strategic sales process for several months. Four non-binding expressions of interest were provided as a result of the first sales

1 2022 ONSC 653 *[Harte Gold]*.

2 *Re Plasco Energy Group Inc. et al* (17 July 2015), Toronto CV-15-10869-00CL (Ont SCJ [Comm List]), Endorsement of Wilton-Siegel J, online (pdf): Ernst & Young Further Endorsement Stay Extension available at: https://documentcentre.ey.com/api/Document/download?docId=19907&language=EN

3 2020 QCCS 3218, leave to appeal to CA denied 2020 QCCA 1488, leave to appeal to SCC refused 2021 CanLII 35003, 2021 CanLII 34999.

4 Janis Sarra, "Reverse Vesting Orders – Developing Principles and Guardrails to Inform Judicial Decisions," 2022 CanLIIDocs 431.

5 R.S.C. 1985, c. C-36.

process, but no binding offers were received. After filing for CCAA protection, the Court approved a second sales process, this time with a stalking horse bid submitted by one of Harte Gold's two primary secured creditors. Harte Gold's other primary secured creditor submitted a competing bid in the second sales process. Ultimately, the stalking horse bid was chosen as the prevailing and winning bid, which took the form of an RVO transaction. Specifically, the RVO transaction involved:

i. The cancellation of all existing and outstanding shares, and the issuance of new shares in favour of the purchaser;

ii. The designated assets, contracts and liabilities would be "vested out" to the Holdco;

iii. The satisfaction by the purchaser of all secured debt and priority payables.

iv. The payment of substantially all pre-filing and post-filing trade amounts;

v. The assumption of several contracts (including various royalty and offtake agreements); and

vi. The retention of substantially all of Harte Gold's 260 employees.

The Court concluded that the value of the purchase price was well over $160 million.

The Court focused on two main issues: (i) the basis for its jurisdiction to grant RVOs; and (ii) key factors the courts should consider when determining the appropriateness of granting the RVO.

Jurisdiction of the Court to Grant RVO's

The Court canvased two prior decisions, *Nemaska Lithium* and *Quest University Canada (Re)*, where RVOs were granted despite opposition from various creditors. The Court noted that in *Nemaska Lithium inc., Re* and *Quest University Canada (Re)*,[6] the court's jurisdiction was found under both s. 11 and s. 36(1) of the CCAA. Justice Penny, however, disagreed with respect to the applicability of s. 36(1) in the context of RVOs, noting that s. 36(1) applies to transactions where the debtor is "selling or otherwise disposing of assets outside the ordinary course of business," whereas an RVO transaction involves the purchase of the debtor company's shares and the "vesting out" of unwanted assets, obligations, and liabilities. Instead, Justice Penny held that s. 11 provides the Court jurisdiction to grant RVOs, "provided the discretion available under s. 11 is exercised in accordance with the objects and purposes of the CCAA." Section 36, while not a stand-alone basis for jurisdiction, should be used to provide additional guidelines to the court when determining if an RVO should be granted.[7]

Key Factors to be Considered by the Courts

In *Harte Gold*, the Court held that the debtor, the purchaser, and especially the court-appointed monitor must be prepared to answer questions such as:

i. Why is the RVO necessary in this case?

ii. Does the RVO structure produce an economic result at least as favourable as any other viable alternative?

iii. Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative?

iv. Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure?[8]

In addition to the above questions, the Court also held that the analytical factors contained in s. 36(3) of the CCAA should be applied, with modification by courts seeking to approve an RVO as follows:

i. Whether the process leading to the proposed RVO transaction was reasonable in the circumstances;

ii. Whether the RVO transaction resulted in better recovery for stakeholders than a bankruptcy proceeding;

iii. The degree of creditor consultation;

iv. The effect of the proposed RVO transaction on creditors and other stakeholders;

v. The fairness of the consideration to be received for the assets; and

vi. Whether the monitor supported the RVO transaction.[9]

6 2020 BCSC 1883, leave to appeal refused 2020 BCCA 364.

7 *Harte Gold* at paras. 37-38.

8 *Harte Gold* at para. 38.

9 *Harte Gold* at paras. 40-77.

RVOs Remain Novel, not the Norm

Justice Penny provides a timely and potentially humbling reminder to the insolvency industry that, despite numerous judicial authorities approving RVO transactions, this relief is not the "norm." Particularly, Justice Penny noted:

> [t]he RVO should continue to be regarded as an unusual or extraordinary measure; not an approach appropriate in any case merely because it may be more convenient or beneficial for the purchaser. Approval of the use of an RVO structure should, therefore, involve close scrutiny. The Monitor and the court must be diligent in ensuring that the restructuring is fair and reasonable to all parties having regard to the objectives and statutory constraints of the CCAA.[10]

RVO Transactions in Mining

In *Harte Gold*, the Court focused on the following factors which led to the approval of the RVO transaction:

i. No creditor was placed in a worse position because of the use of the RVO structure, as compared to more traditional asset sales, given that almost all creditors were to be paid in full;[11]

ii. Harte Gold's assets were extensively marketed; [12]

iii. Without an RVO structure, Harte Gold would have to transfer the numerous permits and licenses necessary for the continued operation of the mine, which involve a complex transfer or new application process of indeterminate risk, delay;[13] and

iv. The RVO structure provided for a timely, efficient and impartial resolution of Harte Gold's insolvency proceedings.[14]

Conclusion

Given the Court's focus and consideration of the cost of transferring the necessary permits and licenses held by Harte Gold in order to operate the mine, *Harte Gold* provides additional reassurance that RVO transactions will continue to be a viable and attractive transaction structure going forward.

10 Harte Gold at para. 38.

11 Harte Gold at paras. 55-65.

12 Harte Gold at para. 66.

13 Harte Gold at paras. 70-76.

14 Harte Gold at paras. 70-76.

Case Law Summaries

Class Actions

Luke Morassut, Charles-Étienne Pressé and Konstantin Sobolevski

0116064 B.C. Ltd. v. Alio Gold Inc., 2022 BCCA 85 and 2022 BCSC 1700

In this decision, the British Columbia Court of Appeal overturned the decision refusing certification of a proposed securities misrepresentation class action and remitted the certification application back to the Supreme Court.

The plaintiff is a former shareholder of Rye Patch Gold Corp. (Rye Patch), whose shares were sold to Alio Gold Inc. (Alio) pursuant to a court approved plan of arrangement. Under the arrangement, Alio acquired all outstanding Rye Patch shares from Rye Patch shareholders in exchange for Alio shares. The price that Alio paid was determined in part by the value of Alio shares. The plaintiff alleged that the class did not receive fair value for their Rye Patch shares due to Alio's misrepresentations.

As discussed in *Mining in the Courts, Vol. XII*, the chambers judge dismissed the plaintiff's certification motion, holding that the pleadings disclosed no cause of action. The chambers judge applied the rule in *Foss v. Harbottle*, finding that only Rye Patch itself could sue for the alleged misrepresentations, as the shareholders have no claim for wrongs done to the corporation unless they bring a derivative action. The chambers judge also held that a class proceeding was not the preferable procedure because individual issues predominated over common issues.

In allowing the appeal, the Court of Appeal held that the rule in *Foss v. Harbottle* did not apply because the claim was by a shareholder to recover a loss suffered as a shareholder.

The claim could not be characterized as a loss to Rye Patch since Rye Patch did not tender shares to Alio under the arrangement. The Court also held that issues of reliance and causation were not a bar to certification in this case. While many common law misrepresentation cases are unsuitable for certification, this case was distinguishable because there was only one transaction at issue — the arrangement — and therefore, the loss to a particular shareholder would not depend on the timing of its purchase. Further, there were only a limited number of specific representations made to shareholders at the same time.

In July 2022, the plaintiff served a Notice to Mediate on Alio pursuant to the British Columbia *Notice to Mediate (General) Regulation*. In 2022 BCSC 1700, the Supreme Court of British Columbia dismissed Alio's application to postpone the mediation. It held that postponement should be granted where it is necessary to ensure an effective and fair mediation but rejected Alio's argument that mediation would be "impractical and futile" in part because certification had not yet occurred. Citing *Jean Coutu Group,*[1] the Court noted that there is no presumption that a certification motion ought to be the first procedural matter heard and determined in a class proceeding. The Court found that there was "no better time" for the parties to attempt mediation than before the second certification hearing. The parties had ample time to understand the issues and there was a good chance that issues could be narrowed at a mediation.

For more on the Court of Appeal decision, see McCarthy Tétrault LLP's Canadian Class Actions Monitor blog post entitled "BC Court of Appeal overturns refusal to certify securities class action finding that issues of causation and reliance were not a bar to certification."

Markowich v. Lundin Mining Corporation, 2022 ONSC 81

In this decision, the Ontario Superior Court dismissed the plaintiff's application for leave to bring an action for secondary market misrepresentation under s. 75 and Part XXIII.1 of the Ontario *Securities Act*, finding a lack of evidence to support the claim. The Court also refused to certify the plaintiff's common law misrepresentation claim finding a class action was not the preferable procedure due to the prevalence of individual issues.

1 *British Columbia v. The Jean Coutu Group (PJC) Inc.*, 2021 BCCA 219.

The defendant Lundin Mining Corporation (Lundin) owns and operates an open pit copper mine in Candelaria, Chile. On or about October 25, 2017, Lundin detected pit wall instability in a localized area of its open pit operations at the mine. On or about October 31, 2017, there was a rock slide at this location. One month later, Lundin issued a news release, consistent with its practice of releasing operational updates in late November, advising investors about the pit wall instability and the rock slide. After the news release, Lundin shares dropped 16%. The plaintiff brought an action for statutory misrepresentation alleging that the pit wall instability and rock slides were "material changes" to Lundin's "business, operations or capital" that were required to be immediately disclosed and reflected in a material change report. The plaintiff also asserted a claim for common law misrepresentation alleging that by failing to disclose these events, Lundin and the individual defendants breached their duty of care to the class.

In dismissing the motion for leave to advance the statutory claim, the Court found that the plaintiff had no reasonable possibility of success. Despite the reasonable possibility that the pit wall instability and rock slide were material to investors, there was no reasonable possibility that the events constituted "changes" to Lundin's "business, operations, or capital." The deferred copper production resulting from the rock slide represented less than 5% of Lundin's worldwide annual production and there was no evidence that the events raised any threat to Lundin's economic viability. The Court noted that pit wall instability is a common risk in open pit mining. When the risks occurred, that may have been a material *fact*, but it did not constitute a *change* in position, course, or direction of Lundin's business, which would have required immediate disclosure.

The Court also declined to certify the plaintiff's common law claim, finding the preferable procedure requirement was not met. The Court rejected the plaintiff's argument that deemed reliance could be established where the misrepresentation was an omission. Each investor would have to show that they would have seen the representation (if it had been made) and that the omission would have affected the price of the securities. Therefore, establishing reliance would require thousands of individual inquiries producing an unmanageable class proceeding.

MM Fund v. Americas Gold and Silver Corp., 2022 ONSC 6515

In this decision, the Ontario Superior Court denied the plaintiff leave to bring an action for secondary market misrepresentation under Part XXIII.1 of the Ontario *Securities Act*, finding that there was insufficient evidence to establish a reasonable possibility of success at trial. The Court similarly declined to certify the common law misrepresentation cause of action due to a lack of factual basis for the plaintiff's claims.

Americas Gold and Silver Corp. (Americas) owns a gold mine at Relief Canyon in Nevada. Americas filed its initial prospectus in August 2020 and its followup prospectus in January 2021. In May 2021, Americas issued a press release disclosing that Relief Canyon had been experiencing modelling, construction, and operational deficiencies, which negatively impacted the mine's gold recovery and production. In an August 2021 press release, Americas announced that it had suspended mining operations at Relief Canyon, as it was unable to achieve sustainable production levels. Following this press release, Americas' stock price dropped significantly. The plaintiff brought an action alleging the May press release revealed material facts that Americas knew and should have disclosed in its August 2020 and January 2021 prospectuses.

In dismissing the application for leave to bring a secondary market misrepresentation claim, the Court held that there was insufficient evidence that Americas knew about the deficiencies at the time the prospectuses were issued. In particular, the Court held that there was no evidence that the May 2021 news release constituted "corrective disclosure." Rather, on its face it appeared to be an announcement of the discovery of new facts. Further, the plaintiff had not put forth expert evidence to explain how Americas would have been in a position to make such disclosure at an earlier stage.

The Court also refused certification of the remaining common law and primary market misrepresentation claims, finding there was no "basis in fact" for such claims. The entire pleading was based on the false assumption that what was later unearthed in the exploration process should have been known from the outset. There was no expert geological evidence to support this conclusion and without such evidence, there was no basis in fact on which the common issues could stand.

MM Fund v. Excelsior Mining Corp. S.C., 2022 BCSC 1541

In this decision, the Supreme Court of British Columbia struck the plaintiff's application for certification of a putative statutory misrepresentation class action, finding that the plaintiff did not have standing to bring the class action as it was not a British Columbian resident.

MM Fund (MM), a mutual fund trust, brought an action against Excelsior Mining Corp. (Excelsior), a copper mining company resident in B.C. MM alleged that Excelsior had made certain prospectus misrepresentations in breach of s. 131 of the British Columbia *Securities Act* and sought

to have the action certified as a class action. Prior to the certification hearing, Excelsior filed an application to strike MM's certification application on the basis that MM was not a resident of British Columbia and therefore lacked standing to commence a class proceeding in the province.

Applying the factors applicable to sequencing applications set out in *Shaver*,[2] the Court first determined that the application to strike should be heard prior to the certification hearing. In doing so the Court noted, in part, that the application concerned a discrete issue based on undisputed evidence, there was no suggestion that another person, who is a British Columbian resident, could step in as representative plaintiff, and the determination had the potential to entirely dispose of the proceeding.

Next, the Court considered MM's standing to commence a class proceedings under the British Columbia *Class Proceedings Act*, ultimately finding that MM did not have standing as it was not a British Columbian resident as required by the Act. In doing so the Court considered *Fundy Settlement*,[3] in which the Supreme Court of Canada held that residence of a trust for the purpose of the *Income Tax Act* is where the trust's "real business is carried on" which is where "central management and control" of the trust takes place. The Court found that MM was a resident of Ontario as that was where it was registered to do business, and where its central management and trustee were located. MM had no physical connection to British Columbia or any other connection beyond the fact that it sells its securities to some British Columbian residents.

Nseir v. Barrick Gold Corporation, 2022 QCCA 1718

In this decision, the Court of Appeal of Québec confirmed the Superior Court's dismissal of Anas Nseir's (Nseir) application for authorization to institute a class action against Barrick Gold Corporation (Barrick) and others for civil liability claims and primary market liability under the Québec *Securities Act* (Act). However, the Court of Appeal allowed the appeal in part, and authorized Nseir to institute a secondary market liability class action relating to alleged misrepresentations regarding Barrick's water management system.

Nseir's claims related to the Pascua-Lama project, a multibillion-dollar mining project located on the border between Chile and Argentina and carried out by Barrick (Project). The Chilean side of the Project was approved in 2006, subject to numerous environmental requirements, including the requirement to refrain from undertaking pre-stripping operations prior to installing and activating a water management system.

Nseir claimed that Barrick falsely represented to investors in a public statement that the Project was being carried out in compliance with relevant environmental requirements, including the performing of pre-stripping operations prior to the installation of a water management system, and that this misrepresentation ultimately led to a 15% decrease in the price of Nseir's

2 *Shaver v. Mallinckrodt Canada ULC*, 2021 BCSC 455.

3 *Fundy Settlement v. Canada*, 2012 SCC 14.

shares when the information regarding the environmental requirements became public. As we reported in *Mining in the Courts, Vol. XI,* the Superior Court dismissed Nseir's motion for authorization to institute a class action for civil liability claims, and primary and secondary market liability under the Act. Nseir appealed.

On appeal, the Court of Appeal indicated that to be successful in a secondary market misrepresentation claim under s. 225.8 of the Act, Nseir must prove: (i) that the issuer released a document containing a material misrepresentation; (ii) that this misrepresentation was subsequently publicly corrected by the issuer; and (iii) that the issuer's security was acquired between the release of the document and the public correction. After reviewing the evidence, the Court of Appeal held that Nseir had a reasonable chance of demonstrating that, had Barrick disclosed that pre-stripping operations had begun notwithstanding that the water management system did not meet the relevant environmental requirements in material respects, the market could reasonably have been expected to react in a significantly different manner. In the Court's opinion, Barrick failed to provide evidence that "demolished" Nseir's submission regarding the materially misleading nature of the respondent's public statement.

The Court further concluded that the role of the public correction is modest at this stage of the proceedings, because "the clearing of the misrepresentation threshold, combined with the fact that the appellant brought an action, suggests that there was a public correction." In the result, the Court of Appeal allowed the appeal in part, and authorized Nseir to assert his secondary market claim relating to the alleged misrepresentations regarding Barrick's water management system on behalf of all Québec residents who acquired the respondent's securities between July 26, 2012 and October 31, 2013.

Poirier v. Silver Wheaton Corp. et al., 2022 ONSC 80

In this decision, the Ontario Superior Court denied leave to commence an action for secondary market misrepresentation under Part XXIII.1 of the Ontario *Securities Act* and denied certification of the plaintiff's remaining common law and statutory claims.

The defendant, Silver Wheaton Corp. (now Wheaton Precious Metals Corp.) (Wheaton), is the parent company of the Silver Wheaton Group of Companies (Wheaton Group), which includes foreign subsidiaries. The Wheaton Group buys and sells precious metals acquired from mine operators pursuant to long-term streaming contracts. While Wheaton buys and sells precious metals from Canadian mines, its subsidiaries buy and sell precious metals from mines outside Canada. As it is related to companies resident outside Canada, Wheaton is subject to the transfer pricing rules under the *Income Tax Act*.

In 2009, the Canada Revenue Agency (CRA) commenced an audit of Wheaton (Audit). Wheaton disclosed the Audit in its annual reports and in the notes to its financial statements but did not disclose a tax liability on its financial statements at any time. In 2015, Wheaton received a proposal letter from the CRA reassessing

Wheaton under the transfer pricing rules and imposing increased taxes and penalties for the 2005 to 2010 taxation years that totalled more than C$350 million. Wheaton disclosed the letter in a press release that day, following which its share trading on the TSX dropped nearly 12%. The CRA later reassessed Wheaton on the basis set out in its letter and Wheaton disclosed the reassessment. Wheaton appealed the reassessment to the Tax Court of Canada. Wheaton and the CRA eventually reached a negotiated settlement in which Wheaton agreed to an adjustment to the transfer pricing formula it had been using that resulted in a tax liability that was "minuscule" compared to CRA's initial assessment. The plaintiff commenced an action alleging that the defendants withheld material facts and made misrepresentations to class members regarding: (i) management's belief that the Audit was not expected to have a material adverse effect on Wheaton; and (ii) the compliance of Wheaton's financial statements with International Financial Reporting Standards (IFRS).

The Court denied the plaintiff leave to commence an action for secondary market misrepresentation on the basis the plaintiff's claim had no reasonable possibility of success. The Court noted that the plaintiff's three witnesses were stacked like a "precarious Jenga tower" with the two expert witnesses relying on the evidence of a former Wheaton employee that was found to be neither credible nor reliable. The Court further held that both of the expert reports were inadmissible on various grounds, including a lack of impartiality and expertise in transfer pricing and IFRS. Ultimately, there was no credible evidence that Wheaton had a probable tax liability that required disclosure or that management did not take into account all available information when it disclosed that it did not believe the tax matters arising from the Audit would have a material adverse effect.

The Court also declined to certify the plaintiff's remaining common law claims for negligence and negligent misrepresentation, finding that a class proceeding was not the preferable procedure for these claims given the predominance of individual issues of reliance, causation and damages. The Court also found that the claim under s. 130 of the *Securities Act* could not be certified on its own because there was no plaintiff who had purchased shares under the prospectus offering. The Court rejected the plaintiff's argument that the common law claims could proceed on issues in common with the s. 130 claim. Finally, the Court found that the pleadings did not disclose a cause of action because a statement capable of being a misrepresentation had not been pleaded by the plaintiff. In this regard, the impugned disclosure: (i) reported management's assessment of the likely tax effect of the Audit, and there was no allegation that management's assessment differed from what was disclosed; (ii) warned of the possibility of reassessment, which ultimately resulted; and (iii) indicated that Wheaton would vigorously defend its position and believed it would prevail, which it ultimately did.

Wong v. Pretium Resources Inc., 2022 ONCA 549

In this decision, the Ontario Court of Appeal upheld a decision of the Ontario Superior Court dismissing a secondary market misrepresentation securities class action, finding that no misrepresentation had been made. The Superior Court decision was the first time the Court had considered the merits of a class action of this kind.

Pretium Resources Inc. (Pretium), now an indirect wholly owned subsidiary of Newcrest Mining Limited, is a mineral exploration company developing the Brucejack gold mine in northwestern British Columbia. As we reported in *Mining in the Courts, Vol. XII*, Pretium engaged Strathcona Mineral Services Ltd. (Strathcona) to oversee a bulk sample program at Brucejack. Pretium had also engaged Snowden Mining Industry Consultants Pty Ltd. (Snowden) to prepare a mineral resource estimate. In 2013, Strathcona voiced concerns about the accuracy of Snowden's mineral resource estimate and urged public disclosure. Snowden considered Strathcona's concerns and advised Pretium that the estimate remained valid. Pretium's technical team also concluded that Strathcona was wrong. Strathcona then resigned, and Pretium disclosed the resignation and Strathcona's concerns about the resource estimate. After this disclosure, Pretium's stock price fell by over half. However, Pretium subsequently received sample results that proved Strathcona was wrong. Ultimately, an operational mine was built, and Pretium's stock price recovered.

The plaintiff brought an action for both common law misrepresentation and statutory misrepresentation under Part XXIII.1 of the *Securities Act* on the basis that Pretium should have disclosed Strathcona's concerns when they were initially voiced. In 2017, the Court granted leave to proceed with the cause of action for secondary market misrepresentation. The Divisional Court refused leave to appeal. Subsequently, the parties consented to certification and brought cross-motions for summary judgment. The Superior Court dismissed the claim, finding that there had been no misrepresentation as Strathcona's concerns were "unsolicited … inexpert, premature and unreliable" and "objectively unreliable or erroneous opinions are not material facts." In the alternative, the defendants had made out the defence of reasonable investigation under s. 138.4 of the *Securities Act*.

In dismissing the appeal, the Ontario Court of Appeal held that the motion judge applied the correct test in determining that Strathcona's concerns were not material facts that ought to be disclosed. The motion judge properly considered the context of Strathcona's concerns, including their reliability, prematurity and the fact that they were expressed outside of Strathcona's mandate. Disclosure of objectively unreliable facts would not advance the objectives of the *Securities Act*. Further, the motion judge had not adopted a hindsight assessment based on Pretium's subjective views — he properly considered evidence of the contemporaneous opinions of Snowden and Pretium, as well as the substance of Strathcona's opinions. Finally, the fact that Pretium's share price dropped after Pretium disclosed Strathcona's concerns did not prove that those concerns were material facts.

For more on this decision, see McCarthy Tétrault LLP's Canadian Class Actions Monitor blog post entitled "First Merits Decision in a Securities Class Action for Secondary Market Misrepresentation Upheld by Court of Appeal – Reliability is an Element of Materiality."

Article

Riding the Costs Escalator – Managing Risk in a Volatile Market

Jennifer Choi

In 2022, inflation became a central talking point in a way that it has not been for decades. Across all sectors, from consumer goods to commodities, prices have been rising at a stunning rate, with inflation hitting its highest rates since the 1980s. Consistent increases in the Bank of Canada and other central bank interest rates, coupled with the ongoing effects of COVID-19, supply chain disruptions, and the war in Ukraine, continue to boost prices. Add raw material shortages and other price risks and it is no surprise that profit margins in the mining sector are under attack.

The 2023 construction environment stands in stark contrast to what it was in years past, when interest rates were low and supply chains reliable. In that environment, fixed-price contracts became a popular means of doing business and allocating risk. Project owners could rely on the price certainty that its contractors and suppliers promised in bids and could forecast capital expenditures with reasonable accuracy. Today's volatile supply chains impede the ability of contractors and suppliers to offer that certainty.

Cost escalation is a particular challenge to the mining industry because the risk of cost escalation typically cannot simply be absorbed by a project owner, or managed by passing on the risk to a contractor, without jeopardizing an entire project or forcing project portfolio rationalization that could jeopardize future project pipelines. Further, cost escalation can open a company up to years of litigation by shareholders, when project costs do not align with the company's forecasts and projections, as it has for Barrick Gold Corporation (Barrick).

Last March, with additional reasons issued in July, the Ontario Superior Court of Justice granted the plaintiffs in a securities class action leave to commence an action against Barrick for certain alleged secondary market misrepresentations related to Barrick's forecasting and capital expenditure budget disclosures for its Pascua-Lama Project in Chile and Argentina in 2012.[1] This decision by Justice Akbarali is the latest in a series of hearings that have been argued before both the Ontario Superior Court of Justice and the Ontario Court of Appeal since 2014.

In the class action against Barrick, the plaintiffs allege numerous misrepresentations in Barrick's capital expenditure and scheduling disclosures between October 2011 and October 2013, during which the capital expenditures estimate increased from US$5 billion to US$8 billion to US$8.5 billion. Barrick, in response, says that the changes reflect unanticipated increases in construction costs, including labour and commodity prices that skyrocketed due to an unexpected earthquake, unexpected currency fluctuations, and government-imposed tariffs, among other things, and that the changes in the estimates are protected as forward-looking information, and were fully and fairly disclosed. Ultimately, the Pascua-Lama Project was suspended in Q3 2013, after Barrick had spent around US$5.1 billion dollars in capital expenditures.[2]

Although the merits of the class action remain to be determined, the problems faced by the project, particularly as a result of increased input costs in Chile and Argentina, and higher inflation rates, are illustrative of how projects in volatile economic and market conditions can get into trouble. What should contractors and owners do to protect themselves at a time when prices are so unpredictable? In some circumstances, a viable option is to negotiate a cost-escalation clause into new or amended contracts.

Cost-escalation clauses are often incorporated into long-term contracts, where the price of inputs or labour is expected to change over the length of the contract. However, a well-drafted cost-escalation clause can be an excellent risk management tool for shorter-term contracts in volatile markets, where no party is at fault for current supply chain issues and all parties need to work together to understand and deal with risks equitably.

The three most common types of cost-escalation clauses are: (i) any-increase escalation; (ii) threshold escalation; and (iii) delay escalation.

i. An any-increase escalation clause, or "day-one escalation clause," entitles a contractor or supplier to reimbursement for price increases that occur after the execution of the contract. This type of clause is typically limited to specific types of materials and will have a benchmark and an allowance associated with specific material. This type of clause completely shifts the risk of a material cost escalation for the types of materials indicated to the project owner/developer

1 *DALI Local 675 Pension Fund (Trustees) v. Barrick Gold Corporation*, 2022 ONSC 1767; additional reasons at 2022 ONSC 4216.

2 On July 14, 2022, Chile's Supreme Court ratified the closure of the Chilean side of the project, which had long been the subject of environmental litigation.

and may be appropriate where time certainty is a greater concern for the owner/developer than cost certainty.

A variation of the any-increase escalation clause is the "rise-and-fall escalation clause," which includes a commensurate savings provision that accounts for any price decreases to the owner/developer's benefit. This type of clause makes sense where market volatility for the materials in question have rapidly increased prior to the bid but are expected to go down by the time the material is ordered.

ii. A threshold-escalation clause entitles a contractor or supplier to reimbursement for price increases that are above a set threshold. The contractor bears the risk of escalation of material prices on the open market up to the threshold (which is set by the parties when the contract is signed) and, after material prices have increased beyond the threshold, the contract price is adjusted to account for the excess, effectively capping the contractor's potential exposure.

   For example, parties could agree that the contractor will take on the risk of material cost escalation up to a 10% price increase over a material's baseline price, which is typically set as the date of execution of the contract. The amount of the adjustment is negotiated into the contract and can be in the form of either full or partial additional compensation. This type of clause may be useful where relevant material prices are increasing in a manner that allows the parties to gauge their relative risk of exposure. However, in a less predictable market, it is prudent for an owner/developer to have a termination for convenience clause in the contract to protect against price increases so great that the project no longer makes business sense.

iii. A delay-escalation clause entitles the contractor or supplier to claim for increased material costs due to the delay in the project's progress past a predetermined date (or number of days). A delay-escalation clause fixes material pricing for an agreed upon period of time and allows for additional compensation if prices increase because the project is delayed. This type of clause may be useful in situations where the majority of materials for the project can be procured early in construction, when the parties have the most information about pricing.

The quantum of additional compensation or adjustment to the contract price can be cost-based or index-based. If cost-based, the additional compensation will be based on the difference between the actual price of the material versus the amount set out in the contract. If index-based, the additional compensation will be tied to an index for the applicable commodity. For example, Statistics Canada publishes various price indexes that provide impartial and reliable measures of price changes across a number of industry and commodity groups.[3]

A well-drafted cost-escalation clause will protect the interests of both a contractor and an owner/developer during times of supply chain disruption and construction cost increases. The selection and negotiation of an appropriate cost-escalation clause at the outset of a project can help parties avoid disruptions during construction and keep key relationships on track, which is particularly important for large multistage projects.

Parties should ensure that the clause is drafted clearly and unequivocally, so as to prevent any misunderstanding of its application. Important issues to consider include:

— the event or events that will trigger the cost-escalation mechanism;

— whether there is an overall cap on the amount that the contract price can be increased;

— notification requirements; and

— the evidence required to substantiate a claim for cost escalation.

A well-drafted cost-escalation clause may not save a project that has doubled in capital costs. However, in an industry like mining, where supply chain logistics are global and currently highly unpredictable, a cost-escalation clause can take some pressure off of contractors and developers/owners, and make it more likely that a project will be successfully completed.

3 Statistics Canada, "Price Adjustment Guide for Contract Escalation" (September 22, 2022) < https://www150.statcan.gc.ca/n1/pub/62f0014m/62f0014m2022012-eng.htm>.

Case Law Summaries

Conflict of Laws

Lindsay Frame

Thunderstruck Resources Ltd. v. Bonga Xploration Drilling Supplies Ltd., 2022 BCSC 404

In this decision, the Supreme Court of British Columbia refused the defendants' application to dismiss an action for lack of territorial competence, or to stay the action in favour of the Fijian courts on the basis of *forum non conveniens*.

The plaintiff Thunderstruck Resources Ltd. (Thunderstruck) is a British Columbia mineral exploration company. The defendant Bonga Xploration Drilling Supplies Ltd. (Bonga) is a British Columbia drilling services company. Thunderstruck and Bonga had entered into a services

contract by which Bonga was to provide certain drilling and other services to Thunderstruck for Thunderstruck's projects in Fiji. The contract, which was drafted by Bonga, specified that it was governed by British Columbia law and that payments would be made in Canadian dollars to Bonga's Canadian bank account.

Thunderstruck terminated the contract in January 2021 and sought repayment of a deposit from Bonga, asserting a lien over Bonga's equipment in the interim. A dispute between the parties quickly escalated, with Bonga ultimately reporting Thunderstruck to the Fijian police for theft of its equipment. The plaintiffs allege that Bonga and the individual defendants then made several defamatory statements about them, including through internet postings on North American investment websites and through emails to Thunderstruck's directors.

In March 2021, Bonga commenced proceedings in Fiji against Thunderstruck and its Fijian subsidiary. In April 2021, Thunderstruck and its CEO, Ms. Bradley, filed a lawsuit in British Columbia for breach of contract, unjust enrichment, and defamation against Bonga, its CEO (Mr. Gale), and his wife (B.C. Action). The defendants brought an application in May 2021 to have the B.C. Action dismissed or stayed on jurisdictional grounds (Jurisdiction Application). At the time of the hearing of the Jurisdiction Application, a decision in respect of Bonga's application for an injunction was the only Fijian proceeding that remained outstanding.

In its decision on the Jurisdiction Application, the Supreme Court of British Columbia concluded that it had territorial competence to hear the B.C. Action, including because the defendants had attorned to the Court's jurisdiction by voluntarily filing a counterclaim, and because the defendants were each found to be ordinarily resident in British Columbia. Additionally, each of the claims had a real and substantial connection to British Columbia: the contract engaged British Columbia law and had Canadian payment terms, and the defamatory statements targeted the British Columbia market.

Further, the Court declined to stay the B.C. Action in favour of the Fijian courts, finding that Fiji was not "clearly the more appropriate forum." The relevant factors supported British Columbia as the appropriate forum, or at worst, were neutral and insufficient to displace the plaintiffs' choice of forum. While witness travel would be required in either case, the British Columbia courts were well equipped to accept video evidence, and there was no evidence of the Fijian courts' ability to do so. The legal issues raised largely implicated British Columbia law; any issues of Fijian law were not overwhelming and could be addressed with expert evidence. While there were proceedings ongoing in both places, the B.C. Action was considerably more advanced, the parties had spent much time and expense advancing the B.C. Action, and the plaintiffs had a legitimate interest in advancing the claim in British Columbia, being the place where they enjoyed their reputations.

Vale Canada Limited v. Royal & Sun Alliance Assurance Company of Canada, 2022 ONCA 862

In this decision, the Ontario Court of Appeal concluded that it had territorial competence and that it was a convenient forum for an insurance dispute with a "centre of gravity" in Ontario, notwithstanding the possibility that parallel litigation might also continue in New York.

Vale Canada Limited (Vale) is a major Canadian mining company based in Ontario. Vale incurred expenditures related to 26 sites globally, including 19 in Ontario that stemmed largely from class actions. As part of its global insurance program, Vale had — over several decades — placed at least 92 insurance policies with 24 primary and excess insurers. Vale sought to recover the costs of defence and indemnity for these large losses from its primary insurers and, if necessary, from its excess insurers. The excess insurance policies, which were largely follow-form to the primary policies, were procured and underwritten on the international insurance market in New York.

Vale and one of its primary comprehensive general liability insurers, Royal & Sun Alliance Insurance Company of Canada (RSA), commenced actions in Ontario to resolve the dispute, immediately after one of its excess insurers, Travelers Casualty & Surety Company (Travelers), started an action in New York for the same purpose. A dispute about the appropriate forum ensued, and jurisdiction motions proceeded simultaneously in New York and Ontario, with both lower courts finding they had jurisdiction to hear the dispute, although the Ontario court found it lacked jurisdiction over one insurer (North River). The New York jurisdiction ruling was under appeal when this Ontario Court of Appeal decision was released.

The Court of Appeal dismissed the insurers' appeals and granted Vale's appeal. As a result, the Ontario courts have jurisdiction over all of the claims. With respect to territorial competence, the Court applied the *Van Breda* factors and concluded that "carrying on business" was a presumptive connecting factor in a contract case. All of the insurers were carrying on business in Ontario because they knew their policies would be received and acted on in Ontario, they all participated in a global insurance program for an Ontario-based company whose mining assets were largely held in Ontario, and the policies related to "Ontario liabilities."

As for the argument that Ontario was a *forum non conveniens*, particularly vis-a-vis the global excess insurers, the Court refused to decline jurisdiction in favour of New York. Instead, it found that the Ontario litigation — and not the New York litigation about the excess policies — was the 'centre of gravity' in the parties' disputes. To decline jurisdiction in favour of New York would have perverse effects, including by allowing the "excess insurance 'tail' [to wag] the proverbial primary liability 'dog.'"

North River Insurance Company filed an application for leave to appeal this decision to the Supreme Court of Canada on February 6, 2023.

For more information on this decision, see McCarthy Tétrault LLP's Canadian Appeals Monitor blog post: "The 'Big Nickel' Stays in Ontario: Court of Appeal Upholds Jurisdiction Challenge."

Case Law Summaries

Contracts

Lindsay Burgess and Christian Spillane

Rock 'N' Roll Aggregates Ltd. v. City of Prince George, 2022 BCSC 1303

In this decision, the British Columbia Supreme Court determined that a settlement agreement had not been reached because the parties had not reached consensus *ad idem* on essential terms.

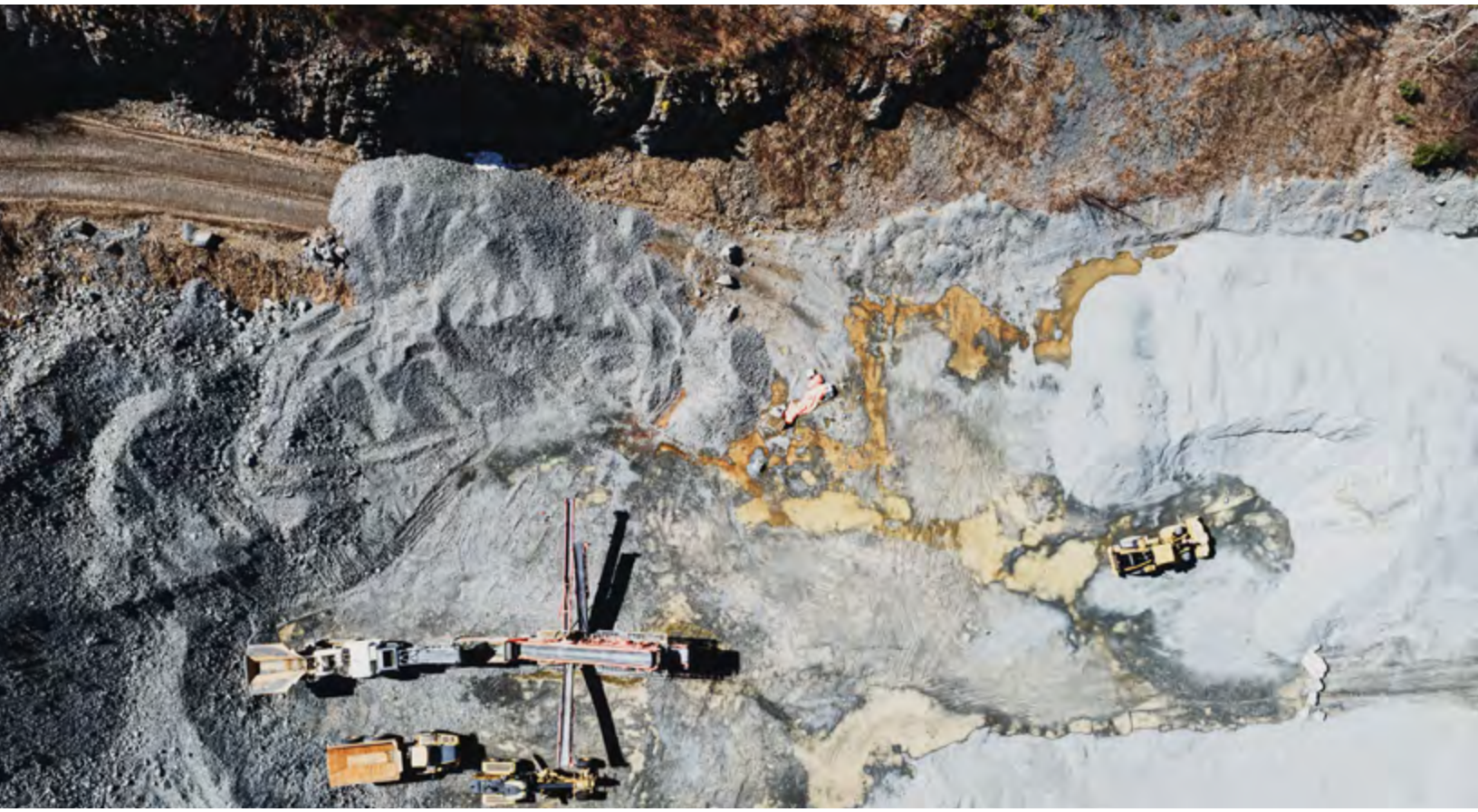
The plaintiff, Rock 'N' Roll Aggregates Ltd. (RNRA), owned lands in the City of Prince George (City) on which the plaintiff, Rolling Mix Concrete (B.C.) Ltd. (RM), conducted a sand and gravel mining operation pursuant to a mining permit (Permit) issued by the Minister of Energy and Mines. The Permit was first issued in 1995, and renewed in 2015, and required a setback of mining operations of at least five metres from the boundary of any other land. In 2019, the City enacted a new bylaw that required a minimum 100 metre setback from the boundary of any land zoned for residential, rural residential, or industrial uses. In 2020, the City issued a notice to the plaintiffs advising that the bylaw applied to them and directed them to stop works taking place within the 100-metre setback, which effectively removed 1/3 of the plaintiffs' sand and gravel reserves.

The plaintiffs commenced an action against the City seeking declaratory relief on the basis the Province of British Columbia has exclusive jurisdiction to regulate

mining and mining activity, or in the alternative a declaration that the bylaw was inapplicable to their operations. The claim also sought damages in the event the City was found to have jurisdiction, but no damages claim was articulated in the event the province was found to have exclusive jurisdiction and the bylaw was inapplicable.

Over the course of October and November 2021, counsel for the parties discussed settlement. The City initially proposed a draft consent order including declarations that the plaintiffs' property was subject to the Permit issued by the Province, which had exclusive jurisdiction over mining activities, as well as a provision that the plaintiffs would not engage in mining activities within a 30-metre set back from residential property. Counsel for the City later sent an email in which she asked counsel for the plaintiffs to confirm that the agreement they had been discussing to resolve the claim included *any* claim for damages. Counsel for the plaintiffs confirmed that his clients agreed the resolution included *the* claim for damages in the action. An endorsed consent order was filed but rejected because it included declaratory relief. The next day, counsel for the plaintiffs advised counsel for the City that he had received instructions to make additional claims for damages and had prepared an amended notice of civil claim to include those damages. The City brought an application to enforce the settlement agreement and strike the amended pleadings.

The Court applied the "objective bystander test" described in *Cumberland (Village) v. Ferdinandi* [1] to determine whether there was indeed a settlement agreement, which required a consideration of all the material facts to determine whether it was clear to an objective reasonable bystander that the parties intended to enter into a contract, and that the essential terms of that contract could be determined with reasonable certainty. The Court found that there was a fundamental misunderstanding by the City's counsel as to the scope of the settlement agreement — the City believing the settlement included *any* damages, when in fact the plaintiffs' counsel had clearly indicated it included *the* damages articulated in the claim. The Court held that the parties clearly had not reached consensus *ad idem* and thus there was no settlement agreement.



1 2018 BCSC 726.

Cardero Coal Ltd. v. Carbon Creek Partnership, 2022 BCSC 253

Here, the Supreme Court of British Columbia determined the parties' rights relating to a coal mining project in northern British Columbia (Project), specifically holding that: (i) Carbon Creek Partnership (CCP) breached its joint venture agreement (JVA) with Cardero Coal Ltd. (Cardero); and (ii) Cardero breached a coal lease (Lease) with Peace River Partnership (PRP).

Under the JVA, Cardero agreed to assume 100% of the costs of exploration, development, mining, and marketing of the Project in exchange for a 75% interest in the Project. Cardero also had the option to abandon any of the Project coal tenures upon giving notice (Abandonment Clause). Pursuant to the Lease and associated lease option, Cardero acquired from PRP exclusive licence to work on the mines under a freehold (Freehold) and agreed to pay PRP a 5% royalty on production. PRP could terminate the Lease in the event that Cardero failed to obtain the permits and approvals necessary to operate the mine by June 15, 2013 or failed to commence production by June 15, 2017.

Falling coal prices impacted project financing and Cardero could not meet the June 15, 2013 permitting deadline. The parties amended the Lease to replace the permitting deadline with a new obligation for Cardero to pay advance royalties, including C$500,000 due on June 2, 2013, and C$2.5 million due on June 2, 2014. Cardero elected to defer payment of the C$500,000, but never ended up paying the advance royalties. After failed negotiations to extend the June 15, 2017 production deadline, Cardero issued a notice of surrender under the Lease, effective May 30, 2014, and a notice of abandonment pursuant to the Abandonment Clause. CCP refused to co-operate in the joint venture until the unpaid advance royalties' issue was addressed. Cardero and CCP delivered notices of default to each other under the JVA.

Cardero commenced an action against CCP for breach of the JVA due to non-co-operation (JVA Action). CCP brought a counterclaim in the JVA Action alleging that Cardero breached the JVA by abandoning the Freehold, contrary to its obligation to maintain the property in trust for the joint venture. In addition, PRP commenced an action against Cardero for breach of the Lease for failure to pay the advance royalties (Lease Action). The Court heard the two cases together and interpreted the two agreements in tandem.

In the JVA Action, the Court ruled in favour of Cardero. The Court held that CCP breached the JVA by failing to co-operate, including by refusing to provide written confirmation of Cardero's authority to deal with the Ministry of Energy and Mines in respect of various coal tenures, and by refusing to follow the steps set out by the management committee. The Court dismissed CCP's counterclaim, holding that Cardero was entitled to abandon the Freehold using the Abandonment Clause; Cardero had no obligation to maintain its interest in the Freehold, did not breach its good faith duties, and was not required to completely withdraw from the JVA due to its abandonment of a single property. In the Lease Action, the Court held that Cardero breached the Lease by failing to pay the first C$500,000 advance royalty which had become due. That obligation had accrued before Cardero's surrender became effective, and Cardero was required to pay it; the fact that payment had been deferred was immaterial.

Genak Enterprises Inc. v. Lake Shore Gold Corp., 2022 ONSC 2981

In this decision, the Ontario Superior Court interpreted the indemnity provisions (Indemnities) in two share subscription agreements for flow-through shares issued by Lake Shore Gold Corp. (Lake Shore) and Temex Resources Corp. (Temex).

The applicants were 10 philanthropists who had participated in flow-through donation financing transactions in 2014; four applicants subscribed for flow-through shares in Temex, and six in Lake Shore. Temex and Lake Shore have since amalgamated. Flow-through shares are issued by a corporation to a subscriber pursuant to an agreement under which the corporation agrees to incur eligible Canadian exploration expenses (CEE) as described in s. 66.1(6) of the *Income Tax Act* that it then renounces to the subscriber, who can deduct 100% of those expenses from their own income. In a flow-through donation transaction, the shares are donated to charity.

Lake Shore owns a mineral property near Timmins, Ontario and operates the Timmins West Mine, which produces from the Timmins Deposit and Thunder Creek Deposit. In 2014 and 2015, Lake Shore conducted an exploration program on three other areas of its mineral property, incurring expenses for surface and underground drilling in an attempt to locate deposits of gold. Lake Shore discovered a viable gold deposit in one of the three areas it explored. On its 2014 to 2016 income tax returns, Lake Shore claimed the drilling expenses as CEE. Temex filed a tax return on the same basis. Lake Shore and Temex were later audited and reassessed on the basis that the majority of the drilling expenses claimed were not CEE and therefore not renounceable. Lake Shore appealed the reassessments (Appeal), but its appeal had not yet been considered by the CRA Appeals Branch or the Tax Court of Canada.

The Applicants also received reassessments proposing to reduce the amount of CEE renounced to them. They each filed a notice of objection with the CRA and sought payment from Lake Shore under the Indemnities. Lake Shore declined, taking the position that the Indemnities were not yet engaged, but advised that it would honour them once the Appeal was resolved. Lake Shore also advised that the Indemnities did not cover interest. As the reassessments went back many years, the interest portion of the Applicants' reassessments were substantial. Eight of the Applicants chose to pay their reassessments in order to stop additional interest from being charged. The Applicants brought an application seeking a declaration that Lake Shore was required to indemnify them now for taxes payable under the reassessments and prejudgment interest.

The Court dismissed the Applicants' motion for a declaration that they are entitled to be indemnified immediately for the taxes paid to CRA. Under the Indemnities, the timing of the payment depended on when the tax amount was "definitively determined" (in the case of Lakeshore) or "determined" (in the case of Temex). In light of the outstanding Appeal, the Court held that the tax amounts subject to the Indemnities have not yet been determined and will not be until a determination is made further to the Appeal on the eligibility for CEE. Having found that the Applicants were not entitled to immediate payment for taxes paid under the Indemnities, the Court did not need to consider the application for prejudgment interest. However, it noted that the Applicants' claim in this regard appeared to be an indirect attempt to recover interest paid on the taxes, which were not recoverable under the terms of the Indemnities.

Imperial Metals Corporation v. Factory Mutual Insurance Company, 2022 BCSC 73

In this decision, the Supreme Court of British Columbia interpreted an insurance policy to determine the coverage limits available for the plaintiffs' business interruption losses arising out of the 2014 tailings dam failure at the Mount Polley Mine (Mine).

Mount Polley Mining Corporation, a subsidiary of Imperial Metals Corporation (together, Imperial), owns and operates the Mine. In 2014, the tailings disposal facility (TDF) at the Mine failed, causing a breach of the perimeter embankment of the TDF. The Mine was shut down for a significant period of time following the failure. As a result of the breach, Imperial suffered physical damage to the TDF, as well as business interruption losses arising from the shutdown. Imperial's out of pocket losses were quantified at over C$132 million, and its business interruption losses between C$181.1 million and C$262.9 million. In a separate lawsuit, Imperial settled its claim against the engineer of record for the TDF for an amount over C$500,000, and with the remaining engineers for C$108 million.

At the time of the breach, Imperial had insurance for the TDF under its primary insurance policy with Factory Mutual Insurance Company (Factory). The table of limit (Limits Table) set out in the declarations of the policy provided a C$250 million aggregate limit for earth movement occurrences, within which there was a C$10 million sublimit for Tailings Disposal Facilities. Separate from the earth movement limit, there was a specific limit for Tailings Disposal Facilities of C$10 million. The central dispute between the parties was whether the C$10 million sublimit was the limit for all of Imperial's losses arising out of the failure of the TDF, including business interruption loss.

Imperial argued that losses relating to physical damage of the TDF were limited to C$10 million per the Limits Table, but as no separate sublimit was provided for business interruption loss, the C$250 million sublimit for earth movement applied to its business interruption losses. Factory argued that the limit specified for TDF in the Limits Table, whether in the earth movement section or the TDF section, is C$10 million and includes both the property damage and business interruption losses.

The Court disagreed with both Imperial and Factory. The Court held that the policy, taken as a whole, was not ambiguous, and that it clearly provided a C$10 million limit on physical loss or damage to the TDF, and an additional C$10 million limit for business interruption losses arising from the loss and damage of the TDF. The Court found that by referring to only physical loss or damage and not loss caused by physical loss or damage, the limits of liability provision in the policy distinguished between the two losses. The C$10 million limit for the TDF applied only to physical losses. The business interruption coverage stated that it was "subject to the applicable limit of liability that applies to the insured physical loss or damage…." The Court read this provision together with the portion of business interruption coverage that defined the insured loss as business interruption loss "directly resulting from physical loss or damage … to property described elsewhere in this Policy…." Read together, the policy insured business interruption losses that arise from physical loss or damage to insured property to the same limit that applied to physical loss or damage. The Court held that the business interruption losses were subject to a separate C$10 million limit.

Prism Resources Inc. v. Detour Gold Corporation, 2022 ONCA 326

In this decision, the Ontario Court of Appeal confirmed that an informal letter agreement asserting that one party would receive a "carried interest" in a mining project created an interest in land in the properties on which the project was located (Properties).

In 1999, Prism Resources Inc. (Prism) entered into a joint venture agreement with Boliden Westmin (Canada) Limited to develop the Properties (Boliden JVA). Pursuant to options granted under the Boliden JVA, Prism earned a 100% interest in the Properties' mining claims and leases. In 2002, Prism and Conquest Resources Inc. (Conquest) entered into a joint venture agreement (Conquest JVA). After that, Conquest acquired most of Prism's interest in the Properties pursuant to the terms of the Conquest JVA. By an informal 2004 letter agreement (Letter Agreement), Prism relinquished its remaining interest to Conquest in exchange for, among other things, a 7.5% "carried interest in the project['s]" net profits.

By 2014, Detour Gold Corporation (Detour) had acquired Conquest's entire interest in the Properties through a series of agreements. The agreements characterized Prism's interest as a "Permitted Encumbrance." However, in 2017, Detour denied that Prism had an interest in the Properties, asserting that any rights Prism had were merely contractual as against Conquest. Prism brought a motion for summary judgment seeking a declaration that it had a valid and enforceable royalty that amounted to an interest in land in the Properties.

As we reported in *Mining in the Courts, Vol. XII*, the Ontario Superior Court of Justice granted the relief sought. The Court considered the circumstances surrounding the Letter Agreement and Conquest's subsequent conduct (i.e., characterizing Prism's interest as a "Permitted Encumbrance" in its agreements with Detour) and determined that Prism and Conquest intended to create a proprietary interest. The Court of Appeal dismissed Detour's appeal, holding that the motion judge committed no palpable and overriding factual error with respect to the facts surrounding the Letter Agreement, properly applied the *Dynex*[1] principles, made appropriate use of the evidence of the surrounding circumstances and the interpretive principle of commercial reasonableness, and properly considered the post-agreement conduct in question.

1 *Bank of Montréal v. Dynex Petroleum Ltd.*, 2002 SCC 7.

Case Law Summaries

Environmental Law

Lindsay Burgess

Altius Royalty Corporation v. Her Majesty the Queen in Right of Alberta, 2022 ABQB 255

In this decision, the Alberta Court of King's Bench upheld a decision of a master of the Court summarily dismissing the plaintiffs' action on the basis the 2018 amendments to the *Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations*, SOR/2012-167 (Regulations) were not an expropriation or "taking" of the plaintiffs' royalty interest in a coal mining facility.

As we reported in *Mining in the Courts, Vol. XII*, the plaintiffs held royalty interests in a coal mining facility that supplies all of its coal to an adjacent power plant, the Genesee Power Plant, pursuant to a dedication agreement. Under the 2012 regulatory regime, the three units at the Plant would be permitted to operate from an emissions perspective for 50 years from their commissioning dates, and the plaintiffs had counted on their royalty stream from the three units being available until 2039, 2044 and 2055. A new regulation pertaining to coal-fired emissions came into force in 2018 (SOR/2018-263). The new regulatory scheme affected existing plants such as the Genesee Power Plant and it required that they meet the new emissions standard by December 31, 2029. While the regulations impacted coal-fired plants directly, the effects upon coal suppliers were collateral.

The plaintiffs brought an action alleging that the new regulation amounts to a constructive expropriation or "taking" of its royalty interest after 2030 by Canada. The defendants, Canada and Alberta, submitted applications to strike or summarily dismiss the action. In 2021 ABQB 3,

a master of the Court summarily dismissed the plaintiffs' action, finding that the plaintiffs invested in a regulated industry with full knowledge that it was regulated. Canada exercised its regulatory powers. The actions of Canada and Alberta did not amount to takings or actionable wrongs. The plaintiffs appealed.

A judge of the Court dismissed the plaintiffs' appeal, finding that the master did not err in granting summary dismissal. The judge agreed with the master's conclusions that there was no evidence that the defendants would recover an interest in the coal, nor that the defendants had an interest in "maintaining the coal in its 'natural' state." As such, the first requirement of the test for de facto expropriation set out by the *Supreme Court of Canada (SCC) in Canadian Pacific Railway Co. v. Vancouver (City) (CPR)*,[1] namely, that the defendants acquired a beneficial interest in the property or flowing from it, had not been met. The Court noted that the SCC's decision in *Annapolis Group Inc. v. Halifax Regional Municipality*, which clarified the circumstances in which state regulation of land use may effect a *de facto* taking of private property, had not yet been released, and as such it was bound by the SCC's earlier precedent in *CPR*.

Gibraltar Mines Ltd. v. Director, Environmental Management Act, EAB-EMA-21-A006(a), EAB-EMA-21-A006(b) and EAB-EMA-21-A006(c)

In EAB-EMA-21-A006(a), the B.C. Environmental Appeal Board (Board) denied Gibraltar Mines Ltd.'s (Gibraltar) application for a stay of a number of amendments to a permit issued under the B.C. *Environmental Management Act* to discharge mine and mill effluent (Permit).

Gibraltar operates a copper and molybdenum mine (Mine) near Williams Lake, B.C. The Mine is located within the Cuisson Creek watershed, which drains into the Fraser River. The Permit authorizes Gibraltar to discharge mine and mill effluent to the ground, saddle dam seepage and run-off to Arbuthnot Creek, and tailings impoundment supernatant to the Fraser River, subject to numerous conditions. As part of its operations, Gibraltar decided to

1 *Canadian Pacific Railway Co. v. Vancouver (City)*, 2006 SCC 5.

remove water from one previously mined pit and transfer it to another previously mined pit, so that it could further mine the first pit. The Ministry of Environment and Climate Change Strategy (Ministry) encouraged Gibraltar to seek an amendment to its Permit in respect of its proposed water transfer plans. Gibraltar questioned why an amendment would be necessary, as in its view the water transfer would not result in the discharge of waste into the environment and such a transfer is standard mining practice. Nevertheless, Gibraltar applied to amend the Permit.

On May 13, 2021, the Director issued its decision amending the Permit, and included a number of amendments that Gibraltar did not apply for (Unsolicited Amendments). Gibraltar is of the view that the Unsolicited Amendments, which include requirements for a groundwater trigger-response plan and certain water quality sampling, adversely affect its interests. Gibraltar appealed the decision to amend the Permit and sought several remedies including a temporary stay of the Unsolicited Amendments pending the Board's decision on the appeal. This decision was the Board's decision on Gibraltar's stay application.

The Board dismissed Gibraltar's stay application. In doing so it applied the three-part test from *RJR-MacDonald*,[2] finding that:

1. **Serious Issue:** Gibraltar met the low threshold for this requirement; the appeal raises serious issues which are neither frivolous nor vexatious and are not pure questions of law.
2. **Irreparable Harm:** The Board accepted Gibraltar's submissions that it will incur costs associated with meeting the Unsolicited Amendments but was not satisfied that the magnitude of harm suffered would be "irreparable" (such as a party being forced out of business or suffering irrevocable damage to its business reputation).
3. **Balance of Convenience:** The Board found that the balance of convenience favours denying the stay and not suspending the Unsolicited Amendments which are, on their face, consistent with the public interest in protecting the environment. In this regard, the Board referenced evidence from the Director's affidavit that the discharge of effluent into the second pit is expected to result in seepage to groundwater that will reach Cuisson Lake.

Gibraltar requested that the Board reconsider its decision, which the Director opposed. In EAB-EMA-21-A006(b), the Board declined to reconsider its decision. In its request for reconsideration, Gibraltar asked the Board to reconsider its decision on the stay application to not consider a new affidavit (Affidavit #2) tendered by Gibraltar with its reply submission. The Board did not consider Affidavit #2 on the stay application as the Board's *Practice and Procedure Manual* (Manual) provides that no new evidence should be included in an appellant's reply submission. The Board upheld that decision, finding that Gibraltar's attempt to file new evidence with its final reply was contrary to the Board's Rule 16, the guidance provided in the Manual and the principles of procedural fairness. As the evidence before the Board would therefore be the same as in the first hearing when the stay application was decided, the Board held that there was no reason to reconsider that earlier decision.

In EAB-EMA-21-A006(c), the Board granted an order sought by the Director under s. 14(c) of the B.C. *Administrative Tribunals Act* (ATA) to amend the Permit to include tailings impoundment supernatant as a source of effluent acceptable for discharge. Despite this being one of the remedies sought in its Notice of Appeal, Gibraltar opposed the Director's request, on the basis that the Board has no authority to make an order granting partial summary relief and that the appropriate means of addressing any potential agreement on amending the Permit is for the Board to issue a consent order. The Board disagreed. In finding that it should amend the Permit as requested, the Board considered not only its broad discretion under s. 14 of the ATA but also the fact that both parties agreed on this amendment.

2 *RJR-MacDonald Ltd. v. Canada (Attorney General)*, [1994] 1 SCR 311.

Reference re Impact Assessment Act, 2022 ABCA 165

In this advisory opinion, a 4-1 majority of the Alberta Court of Appeal concluded that the federal *Impact Assessment Act* (IAA) and *Physical Activities Regulations* (together, the Assessment Regime) are unconstitutional.

The IAA was enacted in 2019 to replace the *Canadian Environmental Assessment Act, 2012*. Its stated purpose includes fostering sustainability, protecting aspects of the environment within federal jurisdiction, and assessing the positive and adverse effects of designated projects in Canada, which includes certain mining projects. The Assessment Regime provides a comprehensive federal process for assessing the effects of projects designated by the federal government and determining whether the designated project would serve the public interest.

Alberta raised concerns about the Assessment Regime's scope and impact on provincial jurisdiction and requested a non-binding judicial opinion from the Alberta Court of Appeal on the regime's constitutionality. The majority concluded that the Assessment Regime was an impermissible intrusion on provincial jurisdiction over intra-provincial activities and resource development. In doing so they remarked that the Assessment Regime gives the federal government "an effective veto over every intra-provincial designated project" based on its own view of the public interest, and concluded that upholding this regime would result in "the centralization of the governance of Canada to the point this country would no longer be recognized as a real federation." One dissenting judge concluded that the regime is constitutional because it regulates effects only within federal jurisdiction, such as effects on fish habitat, Indigenous peoples, and federal lands.

The federal government has filed an appeal of this decision with the Supreme Court of Canada, which is scheduled to be heard in March 2023. In the meantime, this decision does not directly impact the Assessment Regime's validity or applicability, and it remains in full force and effect throughout Canada.

For more on this decision, see McCarthy Tétrault LLP's Canadian Appeals Monitor blog post entitled "Alberta Court of Appeal Finds Federal Impact Assessment Regime Unconstitutional."

Article

Implementation or Bust: Key Outcomes From the COP 27 Climate Change Conference

Selina Lee-Andersen

From November 6 to 20, 2022, delegates gathered at the Sharm El-Sheikh Climate Change Conference (Conference of the Parties or COP 27) against a complex global backdrop of food and energy crises, inflationary pressures, supply chain challenges, biodiversity loss, and geopolitical tensions. The conference was billed as an "implementation COP," which sought concrete action on the climate change policy pledges set out in the Paris Agreement. After two weeks of intense negotiations, the parties adopted two overarching decisions referred to as the Sharm El-Sheikh Implementation Plan (FCCC/CP/2022/L.19) (Implementation Plan). The Implementation Plan covers energy, mitigation, adaptation, loss and damage, science, finance, and pathways to a just transition.

A Historic Decision

The most significant outcome of COP 27 was the historic decision to set up a new fund to address "loss and damage" resulting from climate change. The loss and damage fund is the result of a decades-long effort by climate-vulnerable nations, particularly small island states, to get the global community to recognize the need for funding to respond to the loss and damage associated with the adverse impacts of climate change. Details of the loss and damage fund will be worked out in the coming year, including how the fund will be financed and what claims will be eligible. While the establishment of the fund for loss and damage was a significant achievement, certain parties, including Canada and the European Union, voiced concerns that efforts to curb emissions in order to keep the global temperature increase below 1.5°C did not advance much beyond what had been agreed to at COP 26 in Glasgow in 2021.

Other Key Outcomes From COP 27

Other highlights of the Implementation Plan include:

- Retaining the call to phasedown unabated coal power and to phaseout inefficient fossil fuel subsidies, as adopted in the 2021 Glasgow Climate Pact;
- Urging parties that have not yet communicated new or updated nationally determined contributions (NDCs) or long-term low greenhouse gas (GHG) development strategies to do so by the next COP meeting;
- Establishing a work program on a just transition to discuss pathways to achieve the goals of the Paris Agreement;
- Launching the Sharm El-Sheikh dialogue to enhance understanding of the scope of Article 2.1(c) of the Paris Agreement (i.e. ensuring finance flows are consistent with low-GHG, climate-resilient development), and its interaction with Article 9 of the Paris Agreement (climate finance);
- Urging developed countries to provide enhanced support to assist developing countries to both mitigate and adapt, and encouraging other parties to provide or continue to provide such support voluntarily; and
- Calling for the reform of multilateral development banks, including reforms to their practices and priorities to ensure that operational models and financial instruments are responsive to the global climate emergency.

Progress was also made on the following issues:

- Operationalizing the Santiago Network on loss and damage, which is designed to catalyze the technical assistance of relevant organizations for the implementation of approaches to avert, minimize and address loss and damage at the local, national and regional level, in developing countries that are particularly vulnerable to the adverse effects of climate change;
- Providing operational guidance for scaling up co-operative approaches under Article 6.2 of the Paris Agreement, which creates the basis for trading in GHG emission reductions (also referred to as "mitigation outcomes") across countries;
- Enabling the full operationalization of the Article 6.4 market mechanism;
- Specifying modalities for the work program under the Article 6.8 framework for non-market approaches to promote mitigation and adaptation; and
- Continuing the technical dialogue for the global stocktake, which is aimed at assessing the world's collective progress toward achieving the long-term goals of the Paris Agreement (Article 14).

COP 27 also saw the development of work programs for scaling up mitigation ambition and the Global Goal on Adaptation (GGA). On mitigation, parties agreed to a process to ramp-up efforts to reduce emissions before 2030. On the GGA, parties agreed to a framework that will help countries to collectively achieve the global adaptation goal and review progress toward its achievement before the second global stocktake in 2028.

Canada's COP 27 Initiatives

In advance of COP 27, Canada released the Climate Finance Delivery Plan Progress Report with Germany. The report was produced to provide further transparency on the commitment of developed countries toward the goal of jointly mobilizing US$100 billion per year in climate finance. Canada continues to advocate for clean energy and is calling for greater ambition toward the adoption of carbon pricing globally. At COP 27, Canada and Chile rolled out the Global Carbon Pricing Challenge, which was initially launched by Canada at COP 26. At COP 26, Prime Minister Trudeau had issued a challenge to all countries to triple the global coverage of carbon pricing from around 20% of global emissions today to 60% by 2030 as an important step toward advancing global carbon pricing and achieving net-zero emissions by 2050. New Zealand, Sweden, and the United Kingdom are among countries that are considering, or have already made, carbon pricing fundamental to their approach in fighting climate change.

COP 27 also saw the announcement of C$84.25 million in funding by Canada to support several new initiatives to advance global efforts on climate change, including the following:

Clean Energy Transition and Coal Phaseout

— C$5 million for the Southeast Asia Energy Transition Partnership to support coal phaseout in Indonesia, the Philippines, and Vietnam.

— C$5 million to the Organisation for Economic Co-operation and Development to support its Clean Energy Finance and Investment Mobilisation program, which helps emerging economies attract private sector investment in clean energy.

Loss and Damage

— C$7 million for Global Shield Financing Facility to help provide a co-ordinated approach to climate risk prevention and response.

— C$1.25 million in early support to establish the Santiago Network to help developing countries in averting, minimizing, and addressing loss and damage.

Access to Climate Finance

— $5 million to the Climate Finance Access Network that helps developing countries build their capacity to structure and secure public and private finance for mitigation and adaptation.

Climate Governance

— C$5 million to support the Initiative for Climate Action Transparency that helps developing countries build capacity to advance the implementation of their NDCs and to achieve their targets under the Paris Agreement.

— C$6 million to the United Nations Climate Technology Centre and Network to provide technical assistance and capacity-building support to address climate technology needs in developing countries, with a focus on nature-based solutions and biodiversity.

Gender Equality and Inclusivity

— C$2 million to support inclusivity within the United Nations Framework Convention on Climate Change (UNFCCC) process, by building capacity to enhance the leadership of women climate negotiators in developing countries and support the contributions of Indigenous Peoples to the UNFCCC.

Methane and Small Island Developing States

— C$4 million to help small island developing states in the Caribbean reduce methane emissions and to achieve their climate targets under the Paris Agreement. This program will be delivered in Belize, Grenada, Guyana, and Saint Lucia in partnership with the Global Methane Hub and the Center for Clean Air Policy.

Action on Carbon Pricing and Clean Energy

— C$16 million for the World Bank's Partnership for Market Implementation, to help countries design and implement carbon pricing mechanisms aligned with their development priorities.

— C$28 million to the Energy Access Relief Fund (EARF) to reduce the economic impact of COVID-19 on renewable, off-grid energy companies in Africa and Asia and their clients.

At COP 26 in Glasgow, Canada had announced a C$1 billion contribution to helping developing countries transition from coal-fired electricity to clean power as quickly as possible. This is part of Canada's broader strategy on the phaseout of coal and is aligned with the objectives of the Powering Past Coal Alliance. Canada has also made progress on the Accelerating Coal Transition (ACT) investment program under the Climate Investment Funds (CIF), which directly supports coal power retirement plans in India, Indonesia, the Philippines, and South Africa.

At the G20 Leaders' Summit in Bali, which took place at the same time as COP 27, Canada and its G7 partners secured a landmark Just Energy Transition Partnership (JETP) with Indonesia to mobilize an initial US$20 billion in public and private financing toward significant new targets and policies to limit coal power, increase renewables, and reduce energy sector emissions.

At COP 27, Canada also joined a number of strategic initiatives and partnerships to advance climate action:

— *Least Developed Countries (LDC) Initiative for Effective Adaptation and Resilience* – Canada joined the United States, Norway, Italy, the United Kingdom, Sweden, Ireland, Germany, Finland, Denmark, and Austria in the Partnership Compact for the LDC 2050 Vision, in support of the LDC Initiative for Effective Adaptation and Resilience at the local level.

— *Ocean Conservation Pledge* – Canada joined the Ocean Conservation Pledge, pledging to conserve or protect 30% of ocean water under Canadian jurisdiction by 2030.

— *Collaboration to Reduce Oil and Gas Emissions* – The vast majority of Canada's methane emissions are from three sectors: oil and gas, landfills, and agriculture. In 2021, Canada joined the Global Methane Pledge to reduce global methane emissions by 30% by 2030, compared to 2020 levels. In October 2021, Canada committed to reducing oil and gas methane emissions by at least 75% below 2012 levels by 2030. At COP 27, Canada and the United States agreed to continue to collaborate to further reduce methane emissions from oil and gas operations, with a focus on routine venting and flaring, enhancing leak detection and repair, and addressing issues such as blowdowns and other potentially large releases. In support of such emission reductions, Canada published a proposed framework outlining the main elements of new oil and gas methane regulations. The Government of Canada reaffirmed its target to reduce the country's oil and gas industry's methane emissions by at least 75% by 2030 and committed to working with the sector to identify pathways to achieving net-zero emissions by 2050.

— Canada signed on to the Joint Declaration from Energy Importers and Exporters on Reducing Greenhouse Gas Emissions from Fossil Fuels with the United States, the European Union, Japan, Norway, Singapore, and the United Kingdom. The Joint Declaration represents a commitment to take rapid action to address the dual climate and energy security crises that the world is facing. Canada indicated that it supports efforts to accelerate the global transition to clean energy, as reliance on unabated fossil fuels leaves countries vulnerable to market volatility and geopolitical challenges.

— *Net Zero Government Initiative* – Canada joined the global Net-Zero Government Initiative, committing to achieve net-zero emissions from national government operations by no later than 2050 through the use of cleaner energy sources, the move to zero-emission vehicles (ZEVs), and the pursuit of green and resilient buildings and infrastructure.

— *Zero-Emission Shipping Mission* Transport Canada Greening Initiatives – Canada announced the creation of a Canadian Green Shipping Corridors Framework. Through this initiative, Canada is building on its commitments under the Clydebank Declaration (adopted at COP 26) to support the establishment of green shipping corridors through zero-emission maritime routes between two or more ports.

— *Forest and Climate Leaders' Partnership* – Canada joined the Forest and Climate Leaders' Partnership to prioritize the role of forests and land use in addressing climate change. The Partnership delivers on a commitment made by more than 140 world leaders at COP26 to halt and reverse forest loss and land degradation by 2030, while delivering sustainable development and promoting an inclusive rural transformation.

The Heat is on

In advance of COP 27, the United Nations Environment Program released its annual Emissions Gap Report (EGR), which shows a current trajectory towards a 2.8°C temperature rise by the end of the century (with existing policies and no additional action). The implementation of current pledges will only reduce this to a 2.4 – 2.6°C temperature rise by the end of the century, for conditional and unconditional NDC pledges, respectively. Further, despite new net-zero commitments announced at COP 26, global emissions are anticipated to rise by approximately 10% by 2030 under current governmental policies. To get on track for limiting the global temperature increase to 1.5°C, global annual GHG emissions must be reduced by 45% compared with emissions projections under current policies by 2030, and they must continue to decline rapidly after 2030 in order to avoid exhausting the remaining global carbon budget.

Given the significant gap between climate ambition and action, the pressure is on for more concerted implementation efforts in advance of COP 28, particularly around the development of practical tools for emission reductions, loss and damage, and adaptation finance. COP 28 will be convened from November 30 to December 12, 2023 in Dubai, United Arab Emirates. One area to watch closely at COP 28 will be the global stocktake, which is mandated under the Paris Agreement to take place every five years to evaluate global progress toward the goals of the agreement. The technical review of the first global stocktake started in 2022 and will be delivered at COP 28. One of the intents of the global stocktake is to provide the scientific basis for guiding the climate policies and investment decisions of countries and non-state actors. Also, the Inter-governmental Panel on Climate Change (IPCC) is expected to conclude its sixth assessment cycle with a Synthesis Report to be released in March 2023, which will summarize the findings from the three working group reports and the three special reports from this cycle and serve as the IPCC's main input into the global stocktake. Countries have also established key deadlines for setting a global goal on adaptation by COP 28, as well as making progress and delivering on a number of existing climate finance commitments, including the loss and damage fund and other existing finance commitments that developed countries have failed to deliver on so far, including the US$100 billion in financing to developing countries that was pledged starting in 2020. With the Sharm-el-Sheikh Implementation Plan in place and COP 28 in sight, the focus is now firmly on turning high-level policy commitments into concrete actions to ensure a just transition to achieve the goals of the Paris Agreement.

Case Law Summaries

Expropriation

Lindsay Burgess

Annapolis Group Inc. v. Halifax Regional Municipality, 2022 SCC 36

In this decision, the Supreme Court of Canada clarified the circumstances in which state regulation of land use may effect a *de facto* (or "constructive") taking of private property.

Annapolis Group Inc. (Annapolis) had acquired 965 acres of land in the City of Halifax (Halifax) over the course of several decades and intended to eventually develop it. In 2006, Halifax implemented a municipal planning strategy that reserved a portion of the Annapolis lands for potential inclusion in a regional park, but also zoned a portion of the lands for future urban development. As a result, future residential serviced development could only occur on the lands if Halifax were to authorize a secondary planning process. From 2007 to 2016, Annapolis made several attempts to develop the lands, but Halifax refused to initiate the secondary planning process. Annapolis sued, arguing that Halifax's refusal amounted to a constructive taking of its property.

In 2019, Halifax moved for partial summary judgment of Annapolis' claim, arguing that a constructive taking could not be proven based on Halifax's refusal to initiate the planning process. The motion judge dismissed Halifax's

motion, finding that Annapolis' claim raised genuine issues of material fact requiring a trial, including the weighing of evidence that suggested Halifax had intended to reserve the Annapolis land for a park.

The Nova Scotia Court of Appeal reversed the decision below, finding that Annapolis' claim did not have a reasonable chance of establishing that Halifax had satisfied both elements of the constructive taking test established in *Canadian Pacific Railway Co. v. Vancouver (City) (CPR)*:[1] (i) an acquisition of a beneficial interest in the property or flowing from it; and (ii) removal of all reasonable uses of the property. Specifically, the Court of Appeal held that the first element of the *CPR* test required land to *actually be taken*, which did not occur as a result of Halifax's refusal to initiate the secondary planning process. The Court also held that evidence Halifax intended to secure the use of the lands as a public park was irrelevant to the analysis. Annapolis appealed to the Supreme Court of Canada.

The Supreme Court of Canada considered two issues: (i) whether the acquisition of a "beneficial interest" under the first element of the constructive taking test in *CPR* requires land to actually be taken by the state; and (ii) whether evidence of the state's intended use for the land in question is relevant to the analysis of a constructive-taking claim. In a 5-4 decision, the Court allowed Annapolis' appeal and restored the decision of the motion judge.

On the first issue, the Court found that acquisition of a "beneficial interest" does not require the state to actually obtain a proprietary interest in the property, but rather means that the state has derived an "advantage" from it. The focus of the *CPR* analysis must be on the "*effect* of a regulatory measure on the land owner," and not on "whether a proprietary interest was actually acquired by the government." Applying this framework, the Court found that, after a trial on the merits, it could be proven that Halifax had acquired a beneficial interest in Annapolis' lands, as "[p]reserving a park in its natural state may constitute an advantage accruing to the state."

On the second issue, the Court clarified that while intent is not an element of the *CPR* test, intention may still be relevant for evidentiary purposes. In particular, evidence of a government body's intent, once proven, may constitute a material fact to support a finding that a landowner has lost all reasonable uses of their land. The Court found that evidence of Halifax's intention to treat the Annapolis lands as a public park could potentially support a finding that Annapolis had lost all reasonable uses of its property.

For more on this decision, see McCarthy Tétrault LLP's Canadian Appeals Monitor blog post: "It's the Effects that Count: Supreme Court of Canada Clarifies the Test for Constructive Taking of Private Property through Government Regulation."

1 *Canadian Pacific Railway Co. v. Vancouver (City)*, 2006 SCC 5.

Case Law Summaries

Injunctions

Jonathan Leung and Lindsay Burgess

Baffinland Iron Mines Corporation v. Naqitarvik, 2022 NUCA 10

In *Mining in the Courts, Vol. XII*, we reported on the decision of the Nunavut Court of Justice in 2021 NUCJ 11, in which an interlocutory injunction was granted against protesters at the Mary River Project on Baffin Island restraining them from blocking access to the Project. The protesters filed an appeal, which has not yet been heard. Baffinland Iron Mines Corporation (Baffinland) filed an application to strike the appeal on the basis of inordinate delay.

While the Nunavut Court of Appeal found that there was unreasonable and unexplained delay in prosecuting the appeal, the grounds of appeal are "not overwhelmingly meritorious," and the appellants have other remedies available to them, it nonetheless dismissed Baffinland's application to strike the appeal. Noting the application was a "close call," the fact that Baffinland did not allege any prejudice from the delay and has had the benefit of the injunction in the meantime, ultimately weighed in favour of allowing the appeal to proceed.

Centerra Gold Inc. v. Bolturuk, 2022 ONSC 1040

In this decision, the Ontario Superior Court granted a permanent injunction under s. 247 of the *Canada Business Corporations Act* (CBCA) in favour of Centerra Gold Inc. (Centerra), enjoining its former director, Tengiz Bolturuk (Bolturuk), from breaching his fiduciary duties and his duty of confidentiality owed to Centerra. The case centred around Bolturuk's conduct and his role leading up to the state seizure of Centerra's main asset, the Kumtor gold mine (Mine), by the Kyrgyz Republic around May 2021.

Centerra is a publicly traded gold mining company incorporated under the CBCA. The Kyrgyz Republic through its wholly owned corporation, Kyrgyzaltyn, owned 26% of the issued shares of Centerra. Given Kyrgyzaltyn's

ownership interest, it held the right to designate two persons to be nominated for election to Centerra's Board of Directors (Board). Bolturuk was one of Kyrgyzaltyn's nominees to the Board.

In October 2020, Centerra appointed Bolturuk to its Board as a representative of Kyrgyzaltyn for the stated reason of helping to facilitate better communication between Kyrgyzaltyn and the Board. As a sitting director from October 2020 to May 2021, Bolturuk committed numerous egregious breaches of his fiduciary duty to Centerra including: (i) making public statements proclaiming his focus was to defend Kyrgyzaltyn and not Centerra; (ii) publicly supporting the passing of a local Temporary Management Law (TML) that paved the way toward state control over the Mine; and (iii) timing his resignation from the Board such that the day after his resignation, he was installed as External Manager of the Mine by the Kyrgyz government under the TML.

Centerra sought a permanent injunction under s. 247 of the CBCA to, among other things, enjoin Bolturuk from breaching his fiduciary duties and his duty of confidentiality. As an initial matter, the Court found that Centerra, as a corporation, was a proper "person" and proper complainant under s. 247 to seek remedy against the acts of a director for the benefit of its shareholders. Bolturuk then argued that s. 247 served no basis for relief as he was no longer a director. The Court disagreed, finding Bolturuk's argument was contrary to *Can. Aero*,[1] in which the Supreme Court of Canada held that there is a "strict ethic" that prohibits a director from usurping for himself or diverting to another person or company with whom he is associating a maturing business opportunity that the company is actively pursuing. Furthermore, as set out in *Can. Aero*, a director is precluded from so acting, even after his resignation if the resignation can reasonably be said to have been prompted or influenced by his desire to acquire the opportunity for himself, or if his position with the company is what led him to the later-acquired opportunity rather than a fresh initiative.

Given Bolturuk's public support for the TML, his involvement in consultations with the president of the Kyrgyz Republic about it, the resultant state takeover of the Mine pursuant to the TML, and his coincidental appointment by the Kyrgyz government as External Manager immediately after his resignation, the Court concluded that Bolturuk had indeed breached his fiduciary duty by usurping a corporate opportunity for himself. To arrest further breaches, the Court ordered a permanent injunction against Bolturuk.

Enviroleach Technologies Inc. v. Mineworx Technologies Ltd, 2022 BCSC 180

In this decision, the Supreme Court of British Columbia granted an interlocutory injunction preventing the defendants from disclosing to third parties the details of certain chemical processes pertaining to metallurgical extraction that had previously been shared by the plaintiff.

1 *Can. Aero v. O'Malley*, [1974] SCR 592.

The plaintiff, Enviroleach Technologies Inc. (Enviroleach), is in the business of developing and commercializing technologies for the extraction of precious and non-precious metals using environmentally friendly means. The defendant, Mineworx Technologies Ltd. (Mineworx), is in the business of developing and pursuing technologies to extract platinum metals from catalytic converters. Enviroleach and Mineworx had worked together closely in the past, and the CEO and CFO of Mineworx had previously served as directors of Enviroleach.

In 2016, Enviroleach purchased a proprietary leaching solution from Mineworx known as "Mohave," and began focusing its research and development efforts on the modification and refinement of metallurgical processes. By 2019, Enviroleach was putting some of its research and development efforts into leaching processes to recover metals from catalytic converters. In February 2020, Enviroleach and Mineworx signed a letter of intent (LOI) to enter into a joint venture to accelerate their research and development around, among other things, recovery of platinum group metals. The LOI contained information related to mining chemistry and processes that Enviroleach alleged was confidential and proprietary, as well as certain confidentiality provisions. Mineworx employees began working in the Enviroleach factory and information related to the chemicals and processes used in Enviroleach's leaching process were exchanged. Mineworx disputes that these chemicals and processes were proprietary, and alleges they were in the public domain.

The relationship eventually broke down and the two companies parted ways. In June 2021, Enviroleach commenced the underlying action for breach of confidence, alleging that Mineworx sought to make use of Enviroleach's confidential proprietary information for its own benefit without Enviroleach's authorization. Enviroleach then brought an application for an interlocutory injunction restraining Mineworx and the individual defendants from making any further use of the allegedly confidential proprietary information pending a trial of the action on its merits.

As a preliminary matter, the Court on the injunction application granted several interlocutory orders, including a sealing order over an affidavit tendered by Enviroleach that contained the sensitive commercial information at issue in the action. With respect to the injunction sought, the Court applied the three-part test from *RJR-MacDonald*,[2] finding that:

1. **Serious Issue:** The plaintiff had established a serious issue to be tried. The threshold on this part of the test is a low one and the Court found that Envirotech had an arguable case with respect to its breach of confidence claim.
2. **Irreparable Harm:** The plaintiff established irreparable harm as damages are often inadequate with respect to the misuse of confidential information, and openly allowing the defendants to use allegedly confidential commercial technology may cause permanent market loss to Enviroleach.
3. **Balance of Convenience:** The Court found the strength of the plaintiff's case and possible irreparable harm weighed strongly in favour of some form of injunctive relief. However, an injunction on the terms sought by Enviroleach, namely, restraining Mineworx from using or acting on the chemistry and processes over which Enviroleach claimed a proprietary interest, would threaten the viability of the defendant's business thereby causing it irreparable harm.

On balance, the Court found that a more limited injunction that restrained the defendants from disclosing or disseminating any confidential information to third parties would best preserve Enviroleach's interests, while allowing Mineworx to continue its operations.

2 *RJR-MacDonald Ltd. v. Canada (Attorney General)*, [1994] 1 SCR 311.

Case Law Summaries

Labour and Employment

Marco Fimiani, Caroline-Ariane Bernier, Nadine Houle and Lauren Soubolsky

Weilgosh v. London District Catholic School Board, 2022 HRTO 1194

In this interim decision of the Human Rights Tribunal of Ontario (Tribunal), the Tribunal confirmed that it has concurrent jurisdiction with labour arbitrators over the human rights complaints of unionized employees in Ontario. Although not involving a mine, this decision is relevant for any mining operation with a unionized workforce.

The Tribunal consolidated two matters for the purpose of determining the preliminary jurisdictional issue. Those matters were separate applications brought by Karen Weilgosh, a teacher, and Geraldine McNulty, a police officer, alleging that their respective employers, the London District Catholic School Board and the Regional Municipality of Peel Police Services Board, violated the *Ontario Human Rights Code* (Code).

The Tribunal found that the *Code* contains broad language relating to deferral and dismissal powers. It also found that while making amendments to the Code in or around 2008, the Ontario legislature was presumptively aware of decisions upholding concurrent jurisdiction and made no subsequent attempt to limit or narrow the deferral or dismissal powers. The Tribunal held that the Ontario Legislature intended for overlapping jurisdiction and found that notwithstanding the provisions of Ontario's *Labour Relations Act* and *Police Services Act* granting a labour arbitrator exclusive jurisdiction to decide disputes arising from a collective agreement, the Code grants the Tribunal concurrent jurisdiction with labour arbitrators over human rights complaints. This means that unionized employees may elect to pursue a human rights complaint against their employer by filing an application to the Tribunal *or* through the grievance process pursuant to the applicable collective agreement.

Toronto Transit Commission v. Amalgamated Transit Union, Local 113, 2022 CanLII 43983 (ON LA) (Stout)

In this decision, an arbitrator held that a grievor's termination violated Ontario's *Human Rights Code* (Code) and ordered that G.S. (the Grievor) be reinstated on a modified last chance agreement (LCA).

The Grievor commenced employment with the employer (the TTC) in 2000, initially working as an operator. During his employment the Grievor suffered from various physical ailments that were accommodated by the employer, including placing him into a collector's position in 2012. Shortly thereafter, concerns were raised about the Grievor's fitness for duty, and he underwent a substance abuse assessment. The Grievor was not diagnosed with a substance use disorder but was noted as having been prescribed an excessive amount of OxyContin. As a result, he was subject to unannounced drug and alcohol screening (or testing) for a two-year period.

In April 2017, an audit discovered the Grievor was missing certain funds. An investigation ensued and the Grievor disclosed he had a disability related to substance abuse and required treatment. Following an investigation, the Grievor was terminated. The termination was grieved and ultimately resolved in April 2019 by way of a LCA.

In November 2019, the Grievor was tested again and this time he tested positive for marijuana and above the cutoff level for codeine. The employer terminated his employment, asserting that the Grievor's conduct violated its fit-for-duty policy (Policy), which was a violation of the LCA and barred the Grievor from grieving his termination. While the union acknowledged the Grievor's conduct, its position was that the Grievor was unaware that his use of marijuana and cough syrup would violate the LCA. It also argued that the LCA and its application to the Grievor violated the Code.

The arbitrator determined that the Grievor did breach the LCA when he tested positive for marijuana but that the LCA and its application (which resulted in the Grievor's termination) was a violation of the Code. Imposition of the terms found in the LCA arose directly as a result of the Grievor's various disabilities; most notably his substance abuse disorder. The Grievor was then terminated pursuant to the LCA, which imposed a number of conditions on the Grievor's continued employment that were not applicable to other employees. Most significantly, the LCA contained specific penalty provisions, which deemed non-compliance with the Policy to be grounds for termination and the removal of the Grievor's collective agreement right to grieve unless the factual basis for the termination was in dispute.

In light of the above, the arbitrator went on to determine whether a *prima facie* discriminatory standard is a *bona fide* occupational requirement under the Code. He found that the employer did not apply the terms of the LCA in a reasonable manner having regard to the individual circumstances of the case because any other employee would have the right to grieve, and the collective agreement's just-cause provisions would apply. He agreed with the union that the employer's automatic application of the specific penalty was unreasonable in the circumstances, and it would not be an undue hardship to provide the Grievor with a further accommodation. As a result, he allowed the grievance finding that the Grievor ought to be given one last opportunity to return to the workplace. He made it a condition of further employment that the Grievor enter into a revised LCA based on the terms of the initial LCA but with certain amendments.

Syndicat des métallos, section locale 2008 c. Procureur général du Canada, 2022 QCCS 2455

In this decision, the Superior Court of Québec upheld ministerial orders issued by Canada's Minister of Transport in fall of 2021 that mandated the vaccination of federally regulated transportation workers and rail and air travellers (Orders). The decision impacted mine sites operating on a fly-in-fly-out structure, whose employees travelled to work mostly or exclusively by air.

The Orders forced marine, rail, and air transport employers to adopt mandatory vaccination policies for their employees, and travellers. Unvaccinated employees — both those employed by transportation companies, and those needing to travel to attend work — were suspended without pay, saw their employment terminated, or chose to vaccinate themselves for fear of losing their jobs. The United Steelworkers challenged the Orders' constitutionality on the grounds that they violated s. 7 of the Canadian *Charter of Rights and Freedoms* (Charter). Along with the federal government, the challenge also implicated 11 employers who had adopted vaccination policies as a result of the Orders.

Among these employers were four mining companies,[1] each of which had fly-in-fly-out operations. While most of the companies had not adopted their own mandatory vaccination policies *per se* and their unvaccinated employees were free to report to work through other means of transportation, for most employees, the only practical travel option was by air, meaning the Orders directly impacted the employees' ability to work.

The Court applied the two-step analysis required to determine whether legislation infringes a protected s. 7 Charter right and held that: (i) the Orders *did* infringe on the right to liberty or the right to security of the person by, among other things, breaching the workers' psychological integrity by coercing them to consent to medical treatment for fear of losing their jobs; *but* (ii) the infringement was consistent with the principles of fundamental justice. The judge concluded that while the Orders had an effect on the individual that was not trivial, the effect was proportionate to the Orders' important objectives of limiting the risks of spreading the virus, ensuring transport safety, and avoiding high absenteeism and supply chain disruption. Moreover, the measure was not arbitrary since it was directly related to its objectives. The policy, while severe, was rational and served an important purpose — therefore respecting the principles of fundamental justice.

The Court further determined that if the Orders had been found to violate s. 7 of the Charter, the violation would have been justified by s. 1, which allows for reasonable and justifiable limits on the rights and freedoms of individuals in a free and democratic society.

1 Glencore Canada Corporation (Mine Raglan), ArcelorMittal Exploitation Minière Canada S.E.N.C., Québec Iron Ore Inc. and Canadian Royalties Inc.

Gibraltar Mines Ltd. v. Harvey, 2022 BCSC 385

This case confirmed that the test for family status discrimination in British Columbia is the two-step *Campbell River* test, which requires complainants to prove that: (i) the employer made a unilateral change in a term or condition of employment; and (ii) the change results in a serious interference with a substantial parental or other family obligation.

Lisa Harvey (Complainant) and her husband were employed by Gibraltar Mines Ltd. (Gibraltar). Before her pregnancy, they both worked the same 12-hour shift at Gibraltar. After her leave, the Complainant and her husband requested a change in their shift schedules to work overlapping shifts to facilitate childcare arrangements, which Gibraltar refused. Gibraltar later proposed that they work opposite 12-hour shifts, which the Complainant refused. The Complainant filed a complaint with the British Columbia Human Rights Tribunal (Tribunal) alleging discrimination in her employment on the basis of family status, marital status, and sex, contrary to s. 13 of the B.C. *Human Rights Code* (Code). Gibraltar made a preliminary application to dismiss the complaint. In 2020, the Tribunal dismissed the complaint based on marital status and sex but declined to dismiss it based on family status (Original Decision). Gibraltar Mines argued it had not changed any terms or conditions of employment, because the Complainant's shift hadn't changed, and this was a required element of family status discrimination.

The *Campbell River* test is different than the usual *prima facie* test for other grounds of discrimination under the Code, which requires complainants to prove that: (i) they have a characteristic protected by the Code; (ii) they experienced an adverse impact with respect to an area protected by the Code; and (iii) the protected characteristic was a factor in the adverse impact (the *Moore* test). Further, the *Campbell River* test for family status discrimination has been rejected in other jurisdictions on the basis that it is inconsistent with the *Moore* test and other decisions from the Supreme Court of Canada.

In applying the *Campbell River* test in the Original Decision, the Tribunal declined to dismiss the complaint on the basis of family status on this preliminary application. The Tribunal interpreted jurisprudence and decided it was not a requirement for the Complainant to prove that there was a change to a term or condition of her employment, only that the regular schedule would cause a serious interference with a substantial parental obligation.

Following the Original Decision, Gibraltar applied to the Supreme Court of British Columbia for judicial review. The Supreme Court held in favour of Gibraltar, stating that the Tribunal's interpretation was incorrect, and confirmed the *Campbell River* test. Accordingly, the Court quashed the Tribunal's decision because the Tribunal had used the wrong legal test. The Tribunal appealed to the British Columbia Court of Appeal and was granted leave to appeal. The case was recently heard before a five-judge panel. As five-judge Court of Appeal panels have the ability to change legal precedent in British Columbia, the *Campbell River* test may be overturned (or affirmed) by this panel in the near future.

Teck Coal Limited (Elkview Operations) v. United Steel, Paper And Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers, International Union (United Steelworkers) Local 9346, 2022 CanLII 94378 (BCLA)

This decision confirms that it is reasonable for employers to expect employees to take steps to attend work in adverse weather, and to communicate their absences, if necessary, according to the employer's policies. The fact of adverse weather on its own, does not mean failing to report to work is non-culpable conduct.

This arbitration involved six employees (Grievors) employed by Teck Coal Limited (Teck) at the Elkview mine site. On February 5 and 6, 2017, Highway 3 in the Crowsnest Pass area was closed due to a snowstorm in the area. The Elkview mine site was closed on February 5, and on February 6 until the road reopened around 11 p.m., three hours into the 8 p.m. shift, which all of the Grievors worked. For various reasons, the Grievors did not attend their shift that day and were issued letters of discipline for failing to report to their shifts on February 6, 2017.

Three of the Grievors, Mr. Sant and two others, carpooled to work and had a carpool vehicle that was picked up by another crew during the snowstorm. Mr. Sant had tried to shovel out his personal vehicle, but it became clear to him that it would take hours and he would not be able to attend his shift. Mr. Sant called Teck and advised that the three employees would not be able to attend work. The remaining Grievors alleged they had attempted but were unable to attend work or contact Teck. One grievor alleged he spent three hours shovelling snow to gain access to his vehicle, until he passed out from exhaustion. Another said that he attempted to notify Teck about his absence, but the call was disconnected. The final grievor alleged that he attempted to attend work but became stuck while driving and walked for appropriately two hours back home in the snow. He alleged he could not call Teck until after he returned home because his cellphone was dead. The United Steelworkers Local 9346 (Union) argued that the Grievors' absences were non-culpable, and the letters of discipline should be revoked.

The arbitrator determined that the letters of discipline were warranted for each Grievor except for Mr. Sant. In the case of Mr. Sant, he was actively communicating with Teck about his absence and there was a clear attempt to attend work for his shift. Thus, the discipline was not warranted and should be removed from his file. The remainder of the Grievors' conduct was culpable and worthy of some discipline. There was an obligation on all of the employees to attempt to attend work once the road reopened and to advise the mine site that they would not be attending work on the night in question. This requirement is not onerous. The arbitrator was unconvinced that the remaining Grievors either: (i) attempted to attend work on the night in question; and/or (ii) did not have a means to advise someone at the mine site of their circumstances. The Grievors should have been anticipating a possible road closure for all or part of their February 6 scheduled shift and been monitoring and preparing for such circumstances.

Article

Supreme Court of Canada to Decide Whether an Owner of a Construction Project can Also be an Employer Under Ontario Health and Safety Legislation

Ben Ratelband, Justine Lindner, and Alexander Steele

On October 12, 2022, the Supreme Court of Canada (SCC) heard an appeal of *Ontario (Labour) v. Sudbury (City),*[1] an important and controversial decision of the Court of Appeal for Ontario (ONCA). In that decision, the ONCA that held that the "owner" of a construction project, the City of Greater Sudbury (City), was also an "employer" within the meaning of the *Occupational Health and Safety Act* (OHSA or Act) with the statutory duties of an employer to ensure health and safety at the workplace.

If the ONCA decision is upheld by the SCC, it could have significant implications for owners of construction projects, including mines, whose aboveground infrastructure is often constructed by outside contractors.

Health and Safety Liability in Construction Projects

The intent of the OHSA regime is for one person, the constructor, to have overall authority and legal responsibility for health and safety matters on a project. The Act defines a "constructor" as "a person who undertakes a project for an owner and includes an owner who undertakes all or part of a project by himself or by more than one employer." A person "undertakes" a project if they assume responsibility for it. On all projects, either the owner or someone hired by the owner is the constructor.[2] The constructor is the project's general contractor, who agrees to bear the legal responsibility for ensuring health and safety, shielding the owner from most liability. An owner retains some residual health and safety responsibilities, (including, for example, providing information about designated substances on the project) which cannot be shifted to the constructor.

Despite the existence of a constructor, all employers on a construction project are also responsible for the health and safety of their employees (which includes their employees and the employees of any contractor or subcontractor). A complication arises when an owner sends its own employees or a contractor onto the project to discharge the owner's residual duties or to oversee quality control. With respect to those individuals, the owner would be an "employer," with all of the associated health and safety assurance obligations, but would traditionally not be viewed as having become the project's constructor, nor viewed as an employer of any other workers on the project.

The ONCA decision upended that traditional dynamic.

Background

A member of the public tragically died after being struck by a road grader while crossing a street being repaired on a construction project in downtown Sudbury. The woman had been struck by a grader driven by an employee of the general contractor, Interpaving Limited (the GC).

The City, as the owner of the project, had contracted with the GC to complete the construction. It was a term of the contract that the GC assumed the role of "constructor" for the project, with overall responsibility for health and safety. The City employed inspectors at the project site to monitor contract compliance and quality assurance. The inspectors were the only City staff on the project.

After an investigation by the Ministry of Labour, Training and Skills Development, the GC and the City were charged for having violated provisions of the *Construction Projects*, O. Reg. 213/91 (the *Regulation*), contrary to the OHSA. The City was charged on the basis that it was both a "constructor" and an "employer" within the meaning of the OHSA.

At trial, the City was acquitted of all of the charges, with the trial judge concluding that the City was not a constructor nor an employer on the project. The Crown appealed the acquittal to the Superior Court of Justice, which upheld the trial decision. The appellate court agreed with the trial judge that the City was neither a constructor nor an employer and did not consider whether the City would have a due diligence defence. The Crown appealed to the ONCA to determine whether the trial judge erred in concluding that the City was not an employer under the Act.

ONCA Decision and Analysis

Emphasizing that the OHSA should be interpreted generously given that it is public welfare legislation, the ONCA held that the City was indeed an "employer" within the definition of the OHSA and was therefore liable for the violations of the Regulation found by the trial judge, unless it could establish a due diligence defence.

1 2021 ONCA 252 *(Sudbury)*.

2 The constructor model is similar (though with some notable differences) to the prime contractor model in other provinces.

Whether the City met the definition of an "employer" turned on the application of the definition of employer from s. 1(1) of the OHSA, which provides that:

> "employer" means a person who employs one or more workers or contracts for the services of one or more workers and includes a contractor or subcontractor who performs work or supplies services and a contractor or subcontractor who undertakes with an owner, constructor, contractor or subcontractor to perform work or supply services; ("employeur") …

The ONCA determined that anyone who "employs one or more workers" is an employer for the purposes of the Act and so, as an employer, is "responsible for ensuring compliance with the Act in the workplace."[3] The quality control inspectors at the project site were employed directly by the City. The Court stated, "[p]lainly the City employed one or more workers at the project site within the meaning of s. 1(1),"[4] and thus found the City to fall within the definition of employer under the OHSA. The Court determined that the exemption found at s. 1(3) of the OHSA, which serves to exclude an owner from becoming a constructor solely by engaging a person to oversee quality control, does not exclude an owner from being an *employer* for the purposes of the OHSA.[5]

The ONCA declined to thoroughly examine a question raised by Brown J. A. in granting leave to appeal to the ONCA, regarding whether it is necessary to determine the degree of control a municipality must have in order to fall within the definition of employer in instances where the municipality has contracted work to a third party. The ONCA stated that it was not necessary to resolve that question given its finding that the City was an employer simply by virtue of employing its own quality control inspectors on the project.[6]

Leave to appeal was granted by the SCC[7] and submissions were made by the City, the Crown, and a few interveners, including a group of Ontario municipalities, the Retail Council of Canada, and the Workers' Compensation Board of British Columbia.

Implications for Owners

The potential implications of the *City of Greater Sudbury* decision are significant and troubling for mines undertaking aboveground construction projects in that it appears to represent a departure from how the OHSA scheme has traditionally been applied in interpreting the respective duties of owners, constructors and employers on construction projects. The decision will also be relevant to other jurisdictions with legislative regimes similar to Ontario's OHSA, which likewise allow for the effective delegation of health and safety responsibility from an owner to a party managing a construction project.

Based on the reasoning of the ONCA, depending upon the circumstances, a mine owner may be found to have duties to ensure health and safety on a project as an employer, not just in relation to the mine's own employees but potentially more broadly, to other aspects of the project, even where there is a third-party constructor in place.

The decision also leaves open the question of what steps a mine would be required to take as an employer in order to make out a due diligence defence in such circumstances. These uncertainties pose challenges for owners of construction projects that may only ultimately be resolved through further litigation and future court decisions. The SCC's decision is expected any time, and it remains to be seen whether the Court will uphold the ONCA's decision.

3 *Sudbury* at para. 10.
4 *Sudbury* at para. 14.
5 *Sudbury* at para. 14.
6 *Sudbury* at para. 15.
7 2021 CanLII 126368.

Case Law Summaries

Securities and Shareholders Disputes

Lindsay Burgess

AM Gold Inc. v. Kaizen Discovery Inc., 2022 BCCA 21 and 2022 CanLII 78979 (S.C.C.)

As we reported in *Mining in the Courts, Vol. XII*, the Supreme Court of British Columbia dismissed AM Gold Inc.'s (AM Gold) claims in breach of contract, misrepresentation and trespass against Kaizen Discovery Inc. AM Gold appealed and its appeal was dismissed by the Court of Appeal. AM Gold's application for leave to appeal to the Supreme Court of Canada was dismissed with costs on September 1, 2022.

Taiga Gold Corp (Re), 2022 ABQB 290 and 2023 ABCA 12

In this decision, despite noting some deficiencies in the process, the Alberta Court of King's Bench granted an application for a final order approving a plan of arrangement (Arrangement) whereby SGO Mining Inc. (SGO), a wholly owned subsidiary of SSR Mining Inc. (SSR), would acquire all of the shares, options and warrants of Taiga Gold Corp. (Taiga) in an all-cash transaction. While the Alberta Court of Appeal found that the chambers judge erred in approving the Arrangement, the fact that the transaction had already been completed precluded appellate intervention and the appeal was dismissed.

At the time of the Arrangement, Taiga and SSR had an existing relationship in the gold mining business, and Taiga's primary project was a joint venture with SSR. Taiga brought an application under s. 193 of the Alberta *Business Corporations Act* for a final order approving the Arrangement. The application was opposed by a group of Taiga warrant holders (Objecting Warrant Holders) who argued that: (i) the statutory process was not followed; and (ii) the Arrangement was not fair and reasonable. Approval of the Arrangement would cause each C$0.20 warrant to be exchanged for a payment of C$0.065, while each C$0.30 warrant would be terminated without any payment because none of these warrants were "in-the-money." The Objecting Warrant Holders challenged this valuation, arguing it was not fair or reasonable because it only accounts for the intrinsic value of the warrants and does not consider the time value of the warrants.

The Court applied the test for granting a final order of a plan of arrangement articulated by the Supreme Court of Canada in *BCE* [1]: (i) the statutory procedures have been met; (ii) the application has been put forward in good faith; and (iii) the arrangement is fair and reasonable in that it has a valid business purpose and the objections of those whose legal rights are being arranged are being resolved in a fair and balanced way.

With respect to the first prong of the test, the Court found that a meeting of the warrant holders should have been ordered under s. 193(4)(b) of the Act, which, when read in conjunction with *BCE*, requires a meeting of persons who are holders of rights to acquire securities in a corporation to be ordered if their legal rights are affected by the proposed arrangement.

The Court found that the Objecting Warrant Holders' legal rights were affected because the Arrangement was not contemplated by the warrant certificates. However, although the statutory process had not been followed, the Court found that this was not fatal to the application at this stage because the likely outcome — that the Objecting Warrant Holders would vote against the Arrangement — was obvious.

As there was no allegation that the application had not been put forward in good faith, the Court moved on to the assessment of whether the Arrangement was fair and reasonable. First, in light of Taiga's existing relationships and projects with SSR, the Court was satisfied that the Arrangement was for a valid business purpose. Second, the Court was satisfied that the Objecting Warrant Holders' legal rights were resolved in a fair and balanced way on the basis of the following: (i) the overwhelming vote of the majority of shareholders to approve the Arrangement, contrasted with the relatively small number of warrants held by the Objective Warrant Holders, which would have voted against the Arrangement if given the opportunity; (ii) the compensation for shares, options and warrants under the Arrangement would be equal and occur at the same time; and (iii) there was no evidence as to the valuation of the warrants presented at the application. The application for a final order was granted. The Objecting Warrant Holders appealed.

The appeal was dismissed. The Court of Appeal found that the chambers judge erred in approving the Arrangement despite the fact that the Objecting Warrant Holders had not met and voted on it as required by the Act. However, it ultimately held that appellate intervention was precluded in this case given the transaction, which it agreed was fair and reasonable, had already been completed.

1 *BCE Inc v. 1976 Debentureholders*, 2008 SCC 69.

Case Law Summaries

Surface Rights and Access to Minerals

Christian Spillane

Skeena Resources Ltd. v. Mill, 2022 BCSC 2032

In this decision, the British Columbia Supreme Court upheld a decision of the chief gold commissioner (the Commissioner) that a mine owner lost its mineral rights over previously mined material once the material was deposited off-site.

Skeena Resources Ltd. (Skeena) owned the Eskay Creek Mine (the Mine) and possessed the mineral claims and mining leases for the Mine. Skeena held permits authorizing operation of the Mine, requiring waste rock to be deposited in Albino Lake, and imposing ongoing monitoring and environmental obligations relating to the deposited material. Skeena also held a surface lease for the parcel of land on which Albino Lake was located (the Land) for "waste rock disposal site purposes" (the Surface Lease). Skeena never held mineral rights to the Land. The former operators of the Mine had deposited mined material (the Material) into Albino Lake. After conducting exploratory drilling on the Land, Skeena learned that the Material contained gold and silver.

In May of 2017, Mr. Mill acquired a mineral claim over the Land. He applied to the Commissioner for a determination of who owned the Material. The Commissioner found in favour of Mr. Mill, deciding that Skeena's leases and permits authorized the disposal, not storage, of waste rock in Albino Lake (the Decision). Essentially, Skeena's predecessor relinquished ownership of the Material once it was deposited into Albino Lake.

On appeal, Skeena argued that the reservations contained in the Surface Lease and s. 50 of British Columbia's *Land Act* (reserving mineral rights in the Land to the Crown) only operated in respect of minerals *already* on the Land at the time the Surface Lease was granted, and not to any subsequently deposited material. The British Columbia Supreme Court rejected this argument, holding that mineral ownership rights do not travel with minerals as they change locations; rather, the rights to the Material reverted to the Crown when Skeena deposited them into Albino Lake. Mr. Mill then acquired those mineral rights from

the Crown through his mineral claim. As such, the Court found no palpable and overriding error in the Decision and dismissed the appeal.

Also noteworthy is the Court's finding that the Commissioner overstepped his role on the appeal. The Court disregarded portions of the Commissioner's written submissions that were seen as improperly supplementing the Decision. The Court also criticized the fact that the Commissioner filed a response to the submissions of an intervenor, the Tahltan Central Government. The Court deemed this "troubling," as the Commissioner had no right to respond to the intervenor's submissions.

Skeena has sought leave to appeal this decision to the B.C. Court of Appeal.

Young v. IAMGOLD Corporation, 2022 ONSC 3811

In this decision, the Ontario Superior Court of Justice dismissed an application to temporarily prohibit the respondent, IAMGOLD Corporation (IAMGOLD), from disposing of its 1.5% net-smelter-return interest (the Interest) in 11 patented mineral claims (the Claims) forming part of the Côté Gold Project (the Mine). The Mine is poised to become one of Canada's largest gold mines. The applicant, Ms. Young in her capacity as executor of her late husband's estate (the Estate), sought an interim preservation order so that she could attempt to revive the previous owner of the Interest, Superior Corporate Services Limited (SCSL).

Ms. Young claimed that her husband was the sole shareholder of SCSL, a dissolved company that previously held the Interest. Upon SCSL's dissolution in 1989, the Interest escheated to the Crown. IAMGOLD acquired the Claims in 2012 and purchased the Interest from the Public Guardian and Trustee in 2021 (the Purchase).

After the Purchase became public, Metalla Royalty & Streaming Ltd. (Metalla) contacted the Estate, as it was looking to acquire the Interest. Ms. Young then sought to invalidate the Purchase under Ontario's *Escheats Act, 2015*. However, she acknowledged that she lacked standing to do so and did not have any legal or equitable right to obtain standing. She would have to revive SCSL so that it could make a claim for the Interest. Because SCSL had been dissolved for over 20 years, it could only be revived by statute. Ms. Young had attempted to revive SCSL via a private member's bill, but the proposed bill was rejected. Ms. Young was in the process of making a second attempt at reviving SCSL when this case was heard by the Ontario Superior Court of Justice.

The Court dismissed Ms. Young's application for three reasons. First, Ms. Young lacked standing to pursue a proprietary claim in respect of the Interest. Second, she had no potential cause of action entitling her, as executor of the Estate, to seek injunctive relief. Third, even if she had a claim for injunctive relief, the balance of convenience favoured IAMGOLD in light of the fact that too much time had passed since the Interest escheated to the Crown. There was no evidence that Ms. Young did anything about SCSL or the Interest before Metalla became involved. The Court noted that this did not leave the Estate or its beneficiaries without any potential relief; the possibility remained that they may be able to sue the government for improperly selling the Interest, thereby depriving them of the ability to advance a moral (if not legal) claim to the Interest.

Case Law Summaries

Tax

Lindsay Burgess

Teck Coal Limited v. Assessor of Area #22 – East Kootenay, 2022 BCSC 2013

In this decision, the Supreme Court of British Columbia found that the Property Assessment Appeal Board of British Columbia (Board) erred in its classification of two water treatment facilities (WTFs). An error in classification by the Board affects the valuation methodology of the asset and the applicable property tax rate.

Teck Coal Limited (Teck) owns and operates a number of coal mines in the Elk Valley in British Columbia. High concentrations of selenium were discovered in local watercourses in the early 2000s that were determined to have come from the precipitation and natural run-off flowing through rock spoils created when coal seams are accessed. Teck built two WTFs, one in the District of Sparwood and one in the District of Elkford, to address the selenium contamination. Teck is also required to have and operate the WTFs pursuant to a B.C. Environment Permit.

The Assessor initially classified the WTFs as Class 4 – Major Industry. The Districts each appealed the assessments to the Board, contending that the WTFs should be assessed as Class 6 – Business & Other. The Board found that the WTFs are not directly used to mine, break, wash, grade or beneficiate coal, and as such are not a functional or operational requirement of coal mining. Accordingly, the Board held that the WTFs are not part of an "industrial improvement" as defined in the *Assessment Act* (Act) and as used in the *Prescribed Classes of Property Regulation*, and instead should be properly classified as Class 6 – Business & Other. Teck and the Assessor appealed to the Supreme Court by way of stated case.

On appeal, the Supreme Court found that the Board erred: (i) in evaluating whether the WTFs were used for one of the enumerated purposes in the Act; (ii) in holding that "mining" as used in the definition of "industrial improvement" in s. 20(1)(b) of the Act included only the actual extraction of coal from the ground; (iii) in holding that a legal requirement should be excluded when considering the degree of physical, functional, and operational integration between the improvement and the plant; and (iv) in failing to properly apply the appropriate test. The Court confirmed that when assessing whether an improvement is an industrial improvement within the meaning of s. 20 of the Act, the correct question is whether the improvement is "part of a plant" that is designed and built for one of the enumerated purposes. Here, the continued operation of Teck's mines was conditional on the construction and continued operation of the WTFs. The Court found that there was a sufficient degree of physical, functional and operational integration between the WTFs and their respective mines to render them "part of" those mines. As such, a classification of Class 4 – Major Industry was justified in the circumstances.

Article

Patent Infringement Litigation at the Federal Court of Appeal

Timothy St. J. Ellam, KC, Steven Tanner, Kendra Levasseur, Colleen Bonnyman

As we reported in *Mining in the Courts, Vol. XII*, the Federal Court (FC) in *Swist et. al v. MEG Energy Corp.*, 2021 FC 10 held that the Defendant, MEG Energy Corp. (MEG), an Alberta oil producer, did not infringe certain claims of Canadian Patent No. 2,800,746 (746 Patent) and that certain claims were invalid on the grounds of anticipation and inutility. Jason Swist and his company, Crude Solutions Ltd. (CSL) (the Plaintiffs), appealed the decision (Appeal) to the Federal Court of Appeal (FCA).[1]

The FCA denied the Appeal in June 2022.[2] In doing so, the Court clarified the defence of anticipation and provided guidance on the tasks required (and not required) to be undertaken by both the FC and the FCA. The Appeal decision provides valuable insight for companies, in particular energy companies, that may face patent litigation.

Background

In 2014, the Plaintiffs sued MEG for patent infringement (Claim). Although Jason Swist was the named inventor of the 746 Patent, he assigned ownership of it to CSL prior to filing the Claim.

The Plaintiffs asserted that the 746 Patent described and claimed a method of modifying the known approach of steam-assisted gravity drainage (SAGD) by a specifically timed use of a "third well" between the adjacent SAGD well pairs. The 746 Patent claimed that the early injection of fluid into that third well would generate a large zone of increased mobility between the well pairs and enhance oil production as a result. In the Claim, the Plaintiffs alleged that MEG's sustainable bitumen extraction methods used at Christina Lake, Alberta infringed claims 1 - 6 and 8 of the 746 Patent. MEG denied infringement and counterclaimed that all the patent claims were invalid.

The FC agreed with MEG. It held that MEG's operations do not infringe claims 1 - 6 or 8 of the 746 Patent. MEG had developed its own innovative bitumen extraction methods and did not make use of the method purportedly invented by Jason Swist.

All the claims at issue were also found to be invalid. The FC held that claims 1 - 8 were separately anticipated by three prior art references, i.e., Jason Swist's purported "invention" had already been disclosed to the public, should anyone wish to use it. The prior art references that disclosed the alleged invention were Encana's (now Ovintiv Inc.'s) patent relating to infill well technology, as well as patents owned by Amoco (now BP) and AOSTRA.

The FC also agreed with MEG that the subject matter of the invention was not useful. The Plaintiffs claimed that the subject matter was limited to methods of extracting oil, while MEG argued that the method had to enhance or improve SAGD in order to be useful. The FC agreed with MEG that the "invention" aimed to improve SAGD performance. Claims 1 - 8 were therefore invalid because they covered production methods that not only did not improve SAGD, but actually led to worse results than using SAGD alone.

The Plaintiffs appealed. As a preliminary step, CSL was ordered to pay security for costs in the amount of C$537,190.76 as a guarantee that MEG would be paid its costs for the trial below and the appeal if the Plaintiffs pursued the Appeal.[3] In granting security for costs, Justice Stratas of the FCA noted that he was not satisfied that the Plaintiffs had demonstrated impecuniosity or had made full and frank disclosure of all of their assets, potential sources of funding, and efforts to obtain funding to pay the costs owed to MEG for the trial as well as MEG's projected costs for responding to the Appeal.

The FCA dismissed the Appeal by order dated June 20, 2022. The FCA held that Justice Fothergill made no error with regard to claim construction, anticipation, and non-infringement, and for that reason it found it unnecessary to consider the allegations of overbreadth, obviousness, and inutility. The FCA also awarded MEG its costs. On July 26, 2022, Justice Laskin ordered the Court to pay out C$531,439.77 of security to counsel for MEG.

The FCA's reasons for denying the Appeal provide helpful future guidance for litigants in patent infringement cases.

1 *Swist v. MEG Energy Corp.*, 2021 FC 10.

2 *Swist v. MEG Energy Corp.*, 2022 FCA 118, application for leave to appeal to SCC dismissed with costs 2023 CanLII 19749 [*Swist*].

3 Order of Stratas J.A., dated May 28, 2021.

The FCA is not the Forum to Conduct a Detailed Re-analysis and Reweigh Evidence

A trial win with sufficient evidentiary footing is difficult to overcome on appeal.

On appeal, the Plaintiffs asked the FCA to reanalyze the three anticipatory references that the FC had already considered. The FCA held that it could not do this type of analysis — reweighing the evidence or conducting a detailed reanalysis, especially where there is evidence to support the FC's findings — because that is not its role.

The FCA reiterated that an appeal of factual findings faces "a very stringent standard."[4] With respect to alleged legal errors, the FCA explained that there needed to be an extricable error of law, for example, where the Court applied the wrong legal test or another mistake of that type.

Consider Disclosures of Your Own Methods

The Plaintiffs asserted that MEG was practising MEG's own patented methods for enhanced modified steam and gas push (eMSAGP) and enhanced modified vapour extraction (eMVAPEX), which they asserted infringed the 746 Patent. However, MEG was the first to file for patent protection, and so the Plaintiffs could not credibly argue that MEG took their method. This provided MEG with a powerful rhetorical argument that helped dispel the Plaintiffs unfounded infringement claims.

Innovators operating in Alberta had also patented other methods that MEG alleged anticipated the Plaintiffs' "invention" before the Plaintiffs filed their own application. Those patents already protected the very space that the Plaintiffs sought to monopolize.

Without such disclosures, companies such as MEG would have to rely on s. 56 of the *Patent Act*,[5] which provides limited protection for companies to carry on activities that began before an opponent's patent. The scope of that protection is not yet fully known as it only came into law in 2018. In any event, the power to invalidate claims based on prior disclosures likely remains more potent than the limited ability to continue infringing activities.

Prior Precedent Must be Properly Contextualized

Finally, the Court dismissed the Plaintiffs' assertion that MEG was improperly relying on superseded law of the FCA. In short, the Plaintiffs argued that an FCA case that MEG relied on was no longer good law. That case, *Corlac Inc. v. Weatherford Canada Ltd.*,[6] stands for the proposition that "where the first instance court correctly determines that the validity of dependent claims rests on the inventiveness of the independent claim, it is not required to construe elements of the dependent claims that were not actually in dispute."[7] The Plaintiffs argued that a subsequent decision of the FCA stood for the opposite proposition,[8] that all claim elements must be construed, and effectively overturned *Corlac*.

The FCA agreed with MEG. The Plaintiffs were making the very error that was at issue in *Corlac* as they never explained how the failure to construe claim elements led to a reviewable error. The mere act of not explicitly construing a claim element could not support the Plaintiffs' entire Appeal. When considering the application of prior precedent, it is important to ensure that it in fact addresses the issues before the Court.

Conclusion

This decision highlights the inherent difficulty of overturning a trial decision; the importance of disclosing your own IP or otherwise pre-empting claims; and contextualizing precedent when you're making decisions. The FCA's reasons offer important reminders about the importance of protecting your intellectual property and pre-emptive measures to avoid patent infringement litigation.

4 *Swist at para. 58, referring to Bell Helicopter Textron Canada Limitée v. Eurocopter, société par actions simplifiée*, 2013 FCA 219 at para. 104, reconsideration refused, 2013 FCA 261; *Dugré v. Canada (Attorney General)*, 2021 FCA 8 at para. 42.

5 R.S.C. 1985, c. P-4.

6 2011 FCA 228.

7 *Swist* at para. 22.

8 *Zero Spill Systems (Int'l) Inc. v. Heide*, 2015 FCA 115.

Torts

Lindsay Burgess, Charles-Étienne Pressé and Konstantin Sobolevski

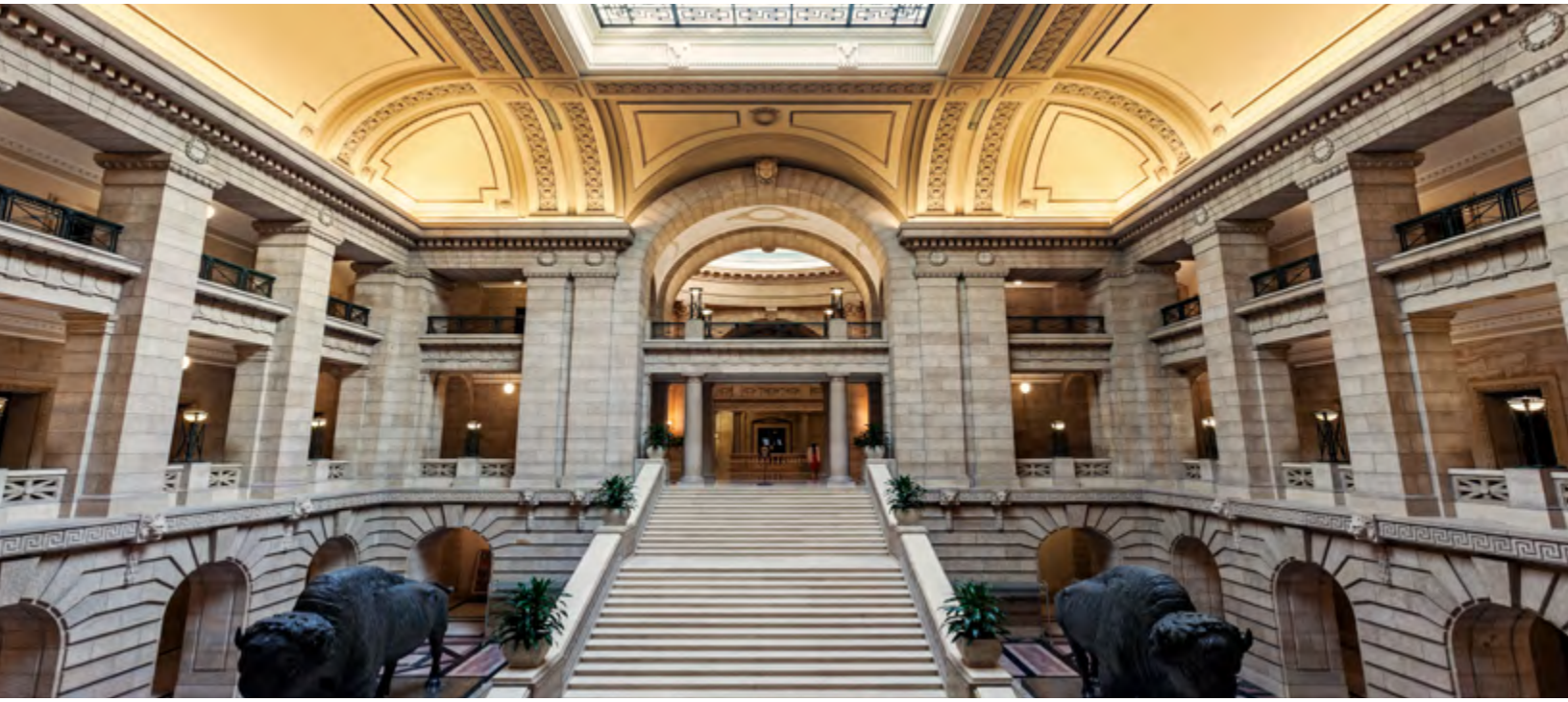
Fayolle v. Placements F.G. Lemay ltée, 2022 QCCA 1136

In this decision, the Court of Appeal of Québec reversed the lower court's decision, finding that the appellants were not negligent or imprudent with respect to a loan granted by the respondent to a mining company.

The respondent, Placements F.G. Lemay ltée (Lemay ltée), is an investment company. The appellants (Appellants) are a group of investors that held direct or indirect financial interests in Sakura Graphite (PVT) Limited (Sakura), a company that operated a graphite mine in Sri Lanka. The Appellants and Lemay ltée have known each other for many years, and often invest in commercial projects and other business together. On May 11, 2012, Lemay ltée granted a C$1 million loan to Sakura. The annual interest rate payable on the loan was 20%, fixed as of December 31, 2013. The loan agreement also provided that in the event of Sakura's inability to repay the loan when due, Lemay ltée would receive 3% of Sakura's share capital. Sakura failed to repay the loan when it became due. Subsequently, Lemay ltée filed a civil suit against the Appellants in the Superior Court of Québec alleging that, in granting the loan to Sakura, it relied on false and misleading representations made by the Appellants. Specifically, Lemay ltée alleged that the Appellants represented that Lemay ltée would not lose any money on the transaction and that the loan would serve as a short-term bridge loan pending the conclusion of an actual financing. At the time the statements were made, Sakura did not have a NI 43-101 compliant technical report and was not in the process of preparing one. The Superior Court of Québec held in favour of Lemay ltée, finding that the Appellants knew or should have known that, without such a report, Sakura could not obtain a long-term loan to repay the loan made by Lemay ltée. The Appellants appealed.

The Court of Appeal held that the Appellants did not owe Lemay ltée a duty of care and due diligence comparable to that of a professional banker or a financial auditor. Furthermore, the Appellants did not attempt to defraud Lemay ltée or to extort a loan from Lemay ltée that they knew Sakura would not be able to repay when due. On the contrary, the Appellants provided Lemay ltée with all the information they had about the mine, all of which proved to be accurate. Furthermore, it is at the time of the loan that the conduct of the parties must be analyzed. At such time, the Appellants did not know the significance of the NI 43-101 technical report to obtain a long-term loan and did not learn of such significance until they received the commissioned report some three months later.

The Court of Appeal further held that the scope of the due diligence obligation of a creditor depends on the circumstances. In this case, the Court found that although Lemay ltée was unaware of the importance of the NI 43-101 technical report for the provision of long-term financing to Sakura, Lemay ltée knew, without needing to make further inquiries, that the nature of the proposed bridge loan presented a high level of risk, justifying the interest rate of 20%, and it was prepared to incur this risk.



Vale Canada Limited v. Urbanmine Inc., 2022 MBCA 18

In this decision, the Court of Appeal of Manitoba clarified the difference between the principles of contributory negligence and mitigation of damages in the context of the tort of conversion.

The plaintiff, Vale Canada Limited (Vale), owns and operates a nickel mining, smelting and refining operation in Thompson, Manitoba. Between July 2012 and May 2013, the Schwartz Defendants (as described in 2020 MBQB 127), in a series of thefts, stole approximately 484,000 total pounds of nickel from Vale's property and sold it to the defendant, Urbanmine Inc. (Urbanmine) for just under C$2.5 million. Urbanmine then resold the stolen nickel to a third party, ELG Metals, Inc. (ELG), during the same period for just over C$3.4 million. Vale brought an action against Urbanmine and the other defendants on multiple grounds, including the tort of conversion.

Vale sought and was granted summary judgment against Urbanmine for conversion. At the hearing of Vale's motion, Urbanmine conceded that conversion is a strict liability tort and that its purchase and resale of the stolen nickel constituted conversion as alleged in the claim. However, it argued that a trial was required on the issue of Vale's mitigation of damages, and specifically the efforts made by Vale to secure its premises, safeguard the nickel, and prevent and discover thefts in a timely way. Urbanmine argued that had Vale undertaken these measures before and after the

initial theft, subsequent thefts would have been avoided and Vale's damages reduced. The motion judge held that there was no genuine issue requiring trial. Specifically, the motion judge found that Urbanmine's position was really an attempt to raise a defence of contributory negligence, which is not available for the tort of conversion, as opposed to a failure to mitigate. Urbanmine appealed.

The Court of Appeal dismissed Urbanmine's appeal, finding that the motion judge correctly applied the legal principles related to mitigation of damages, and was correct in finding that Urbanmine's defence was unavailable because it related to contributory negligence, not mitigation. The Court noted that the foundational difference between the two concepts is timing: while contributory negligence relates to conduct occurring prior to or at the time of the loss, mitigation relates to conduct occurring *after* the plaintiff becomes aware of the loss. Moreover, contributory negligence relates to apportionment of *liability*, while mitigation relates to apportionment of *damages*.

The Court of Appeal also addressed Urbanmine's argument that once the first of a series of thefts occurred, there came a point when Vale "ought to have known" of the ongoing thefts and consequently was required to mitigate its losses from that point forward. While the duty to mitigate generally arises when the plaintiff knew or ought to have known of the wrongful act, the issue with respect to conversion boils down to whether the plaintiff was actually notified of the conversion. In this case, there was nothing in the evidentiary record to indicate Vale had ever been notified or became aware of the thefts prior to discovery by its workers during an inventory check. As such, Vale could not be expected to mitigate the losses from the thefts when it was not aware they were occurring, and the Court upheld the motion judge's finding that Vale fulfilled its duty to mitigate.

Urbanmine Inc. et al v. ELG Metals, Inc., 2022 MBCA 51

Related to the previous case summary, in this decision the Court of Appeal of Manitoba considered the application of s. 2(1)(c) of *The Tortfeasors and Contributory Negligence Act* (Act) on a motion for leave to commence a third-party claim in an action grounded in the tort of conversion.

ELG Metals, Inc. (ELG) appealed an order granting the defendants, Urbanmine, Mark Chisick and Adam Chisick (Urbanmine Defendants) leave to commence a third-party claim against it for "indemnity and/or contribution for any amounts which the [Urbanmine Defendants] may be liable to the plaintiff from this action." The Urbanmine Defendants argued that s. 2(1)(c) of the Act provided them with a statutory right to contribution from ELG because ELG committed the tort of conversion against Vale by purchasing the stolen nickel from the Urbanmine Defendants. ELG argued that s. 2(1)(c) must be read with s. 2(2) of the Act (which addresses the amount of contribution) and is not compatible with actions grounded in the tort of conversion.

In dismissing the appeal, the Court of Appeal found that the Urbanmine Defendants had established a *prima facie* right to contribution from ELG under s. 2(1)(c) of the Act. Specifically, the Court found that the absence of the concept of fault in s. 2(1)(c) supported its conclusion that the right of contribution provided by that section applies to all torts, including strict liability torts such as the tort of conversion. Moreover, the third-party claim reasonably established that ELG would, if sued, have been liable to Vale in conversion for its acquisition of the stolen nickel, and would have been liable for the same damage as the defendants (being Vale's loss of the nickel). As these two prerequisites had been met, a *prima facie* case for a statutory right to contribution from ELG had been established.

With respect to the claim for indemnity, the Court of Appeal noted that s. 2(1)(c) provides that if a defendant is required to indemnify the other tortfeasor (such as through a contract between them), then the defendant cannot obtain contribution from that other tortfeasor. However, this has no bearing on whether the other tortfeasor is or would be directly liable to the plaintiff. In any event, the court found that the issue of whether ELG is entitled to be indemnified by the Urbanmine Defendants is not a procedural bar to the third-party claim under s. 2(1)(c), but rather is a potential defence that ELG can raise later if the third-party claim proceeds.

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