Mining in the Courts
Year in Review

Vol. IX – March 2019

mccarthy tetrault

mccarthy tétrault

Mining in the Courts
Year in Review
Vol. IX – March 2019

Table of Contents

Table of Contents

Welcome to *Mining in the Courts*, Vol. IX

This is our ninth year bringing you *Mining in the Courts*, a publication that provides an annual update on legal developments impacting the mining industry.

This edition contains summaries of important Canadian court cases from the past year that may impact your business, as well as our commentary on issues of interest to the mining sector.

The case summaries are arranged by subject matter and include Aboriginal law, contract disputes, environmental law, municipal law, and tax, reflecting the wide array of legal issues mining companies face.

Interspersed with the case summaries are articles providing our insights on current legal trends and what the mining sector can expect in 2019. Noteworthy articles in this edition include *Trans Mountain Decision: Application of Existing Principles or Evolving Standard?* (page 6) *and Valuation in Mining Cases: Lessons from the Re Nord Gold SE Dissent Proceeding* (page 65).

Mining in the Courts is a publication of McCarthy Tétrault LLP's Mining Litigation Group. The Group draws from one of Canada's largest and longest-standing litigation groups involved in many of the most high-profile, precedent-setting cases in Canadian legal history. Our Group also has the benefit of being able to draw from the extensive expertise of our mining business lawyers. Together we achieve positive outcomes for our clients.

For more information about *Mining in the Courts*, please contact:

Aidan Cameron, Partner
604-643-5894
acameron@mccarthy.ca

Editor-in-Chief

For information about McCarthy Tétrault LLP's Mining Litigation Group, please contact our Co-Chairs:

Nicholas Hughes, Partner
604-643-7106
nhughes@mccarthy.ca

Christopher Hubbard, Partner
416-601-8273
chubbard@mccarthy.ca

Thank you to all of our contributors who are noted throughout the publication. Special thanks to Jack Ruttle and Lindsay Burgess, Assistant Editors, for their work on this publication, and to Naeem Bardai, Chris Scotland, Julia Riddle, Daniel Siracusa and Andrew Butler for their thorough research. Thank you also to Bianca Déprés and Angela Juba for their assistance.

Trans Mountain Decision: Application of Existing Principles or Evolving Standard?

Bryn Gray

In 2004, the Supreme Court of Canada recognized that there is a duty to consult Indigenous groups whenever the Crown is contemplating conduct that could adversely impact asserted or established Aboriginal or treaty rights. Since then, there have been hundreds of court cases in which Indigenous groups have gone to court to challenge the adequacy of consultation and/or accommodation for certain Crown decisions, particularly in the context of resource development. This has been a challenging area for proponents, with many feeling that the standard to be met is a continually moving goal post.

In 2018, the most widely discussed duty to consult case was the Federal Court of Appeal's (FCA) decision to quash the Trans Mountain Expansion Project (TMX Project) based, in part, on inadequate consultation with Indigenous groups. While some feel that the Court simply applied existing duty to consult jurisprudence, a closer examination arguably reveals that the FCA applied a stricter standard on certain issues, including accommodation, the standard of review, and the adequacy of written reasons. While it remains to be seen whether other courts will take a similar approach to these issues in the future, the decision highlights the challenges that proponents can face with an evolving standard and some measures that should be taken to minimize risk going forward.

Background on the TMX Project and the FCA Decision

The TMX Project is a proposed twinning of an existing pipeline from Edmonton, Alberta to Burnaby, B.C. designed to bring more of Alberta's oil to tidewater for export to Asian markets. The project involves the

construction of 987 kilometres of new pipeline segments and associated facilities, with approximately 89% of the pipeline route running parallel to existing disturbances. The operation of the proposed expanded pipeline system would increase overall capacity from 300,000 barrels a day to 890,000 barrels a day. It is also projected to increase the number of tankers at the Westridge Marine Terminal in Burnaby from approximately five per month to 34 per month. The tanker traffic would be within an established shipping route with significant vessel traffic.[1]

The federal Cabinet approved the TMX Project on November 29, 2016 based on the recommendation of the National Energy Board (NEB). Following a detailed review and environmental assessment, the NEB concluded that the TMX Project was in the public interest and unlikely to cause significant adverse environmental effects if certain conditions and mitigation measures were implemented. The NEB's conclusions were based on an environmental assessment under the *Canadian Environmental Assessment Act, 2012*, which did not assess the impacts of project-related marine traffic. However, the NEB did separately assess this issue under the *NEB Act* and determined that the operation of project-related vessels would likely result in significant adverse effects on the Southern Resident Killer Whale and traditional Indigenous uses associated with the whale, which is an endangered species. These findings were before Cabinet when it approved the project with 157 conditions.[2] The then proponent also underwent a separate voluntary federal review process for marine transportation, which proposed additional measures to provide for a high level of safety for tanker operations and the proponent agreed to adopt each of the recommended measures.[3]

The former proponent undertook significant consultation with Indigenous groups and numerous Indigenous groups participated in the NEB process. Federal officials also consulted with Indigenous groups both before and after the release of the NEB report and Indigenous groups were provided the opportunity to provide short written submissions to Cabinet.[4]

After the federal government announced its decision, judicial reviews were commenced by two municipalities, two environmental groups, and five Indigenous groups/collectives. The Indigenous groups/collectives were all in British Columbia and were concerned with a variety of issues including

1. *Tsleil-Waututh Nation v. Canada*, [2018] FCA 153 at paras. 12-13. [*"Tsleil-Waututh"*]. See also National Energy Board Report, *Trans Mountain Expansion Project*, May 2016.
2. *Tsleil-Waututh*, at paras. 68, 83, and 440.
3. *Tsleil-Waututh*, at paras. 89-92.
4. *Joint Federal/Provincial Consultation and Accommodation Report for the Trans Mountain Expansion Project*, November 2016, online: https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/energy/pdf/TMX_Final_report_en.pdf.

marine safety, impacts to an aquifer, impacts on culturally significant sites and traditional harvesting activities, impacts on asserted Aboriginal title, pipeline safety, and emergency preparedness.

The FCA ultimately quashed the federal government's approval on August 30, 2018 after finding that the consultation undertaken by federal officials was inadequate and that the NEB did not adequately assess the impact of increased tanker traffic on marine life. With respect to the duty to consult, the FCA found several deficiencies, including a lack of meaningful two-way dialogue between Indigenous groups and federal officials, insufficient accommodation and a lack of willingness on the part of the federal government to depart from the NEB's findings and conditions, and that the federal government disclosed its rights impact assessments too late in the process.[5] In addition, the FCA also found that the NEB's report did not give adequate information to the federal government on marine shipping due to a lack of sufficient consideration of mitigation measures relating to the impacts on the Southern Resident Killer Whale.[6]

In quashing the decision, the FCA directed the federal government to refer the matter back to the NEB for reconsideration on issues relating to marine shipping and to redo its consultation after the NEB issues a revised report.[7] The NEB is currently undertaking this further assessment and is expected to release its report by February 22, 2019. The federal government is also currently conducting additional consultations with Indigenous groups, which will continue following the release of the NEB report, and it is expected that the federal government will make a decision on the project prior to the fall 2019 election.

Court Reaffirms and Applies Certain Existing Duty to Consult Principles

Before discussing areas where the Court arguably diverged from existing jurisprudence, it is important to underscore that the Court did reaffirm and apply certain existing and important duty to consult principles.

First, the Court underscored the importance of meaningfulness of consultation. As the Court correctly noted, the duty is not intended to allow Indigenous groups to "blow off steam" and is "not fulfilled by simply providing a process for exchanging and discussing information" but rather "entails testing and being prepared to amend policy proposals in light of information received, and providing feedback."[8] In other words, it is not intended to be a box-ticking exercise in which concerns are documented but no serious consideration is given to addressing them. The FCA's focus on

5. *Tsleil-Waututh,* at paras. 557-646.
6. *Tsleil-Waututh*, at paras. 431-470
7. *Tsleil-Waututh*, at paras. 768-770.
8. *Tsleil-Waututh*, at paras. 499-500.

the quality rather than quantity of consultation is consistent with a general trend in the case law that shows an increasing scrutiny of consultation and accommodation, but arguably goes beyond existing jurisprudence in the degree to which meaningfulness is assessed as discussed below.

Second, the FCA reiterated that consultation must focus on impacts to rights and not environmental effects per se and that impacts to constitutionally protected rights are not to be considered as "an afterthought to the assessment environmental concerns."[9] This is consistent with the Supreme Court of Canada's recent decision in *Clyde River* and underscores the need to prepare separate and individual assessments for each potentially impacted Indigenous group detailing what asserted and established Aboriginal and treaty rights may be adversely impacted by the project and how they may be impacted or not. These assessments should be shared with the Indigenous groups as early as possible for comment.[10]

CONSULTATION IS NOT FOR BLOWING OFF STEAM. IT MUST BE MEANINGFUL.

Third, the FCA correctly held that there is no duty to agree and that the duty to consult requires a commitment to a meaningful process and not a guaranteed result or veto.[11]

Notwithstanding the application of these already established principles, there are a few areas where the FCA arguably diverged from existing jurisprudence as discussed below.

Accommodation

The FCA arguably applied a new standard for accommodation by failing to give any weight to specific measures that were introduced by the federal government to address Indigenous concerns. These measures included an Indigenous Advisory and Monitoring Committee for Indigenous groups to participate in the monitoring of construction, operation, and decommissioning of the project and a C$1.5 billion Oceans Protection Plan to create a world-leading marine safety system that would, among other things, build local emergency response capacity of Indigenous communities and invest in oil spill clean-up research. It also included a commitment by the federal government to develop and implement a recovery plan for the Southern Resident Killer Whale before any shipping from the project begins which will be "designed to more than mitigate the effects of the project" and address the three main stressors impeding the recovery of the Southern Resident Killer Whale population.[12]

9. *Tsleil-Waututh,* at para. 504.
10. *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, [2017] 1 SCR 1069 at para. 51.
11. *Tsleil-Waututh*, at para. 494.
12. Government of Canada, *Trans Mountain Expansion Project,* online: https://www.nrcan.gc.ca/energy/resources/19142.

The Court did not give any weight to these measures because they had not yet been implemented and it was unclear to the panel whether they would meaningfully address the concerns of Indigenous groups:

> "While Canada moved to implement the Indigenous Advisory and Monitoring Committee and Oceans Protection Plan, these laudable initiatives were ill-defined due to the fact that each was in its early planning stage. As such, these initiatives could not accommodate or mitigate any concerns at the time the Project was approved, and this record does not allow consideration of whether, as those initiatives evolved, they became something that could meaningfully address real concerns."[13]

A similar statement was made about the proposed action plan for the Southern Resident Killer Whale.[14] These were important measures that Canada introduced in response to concerns of Indigenous groups about pipeline and marine safety. By not considering them, the Court failed to take into account key measures that arguably demonstrate that consultation on these issues was meaningful. The Court's approach to this issue is also problematic as it disregards the fact that most accommodation measures for project approvals will not be fully developed and implemented before a Crown decision has been made and that the duty to accommodate does not guarantee a specific outcome when it arises. It also disregarded the time available to further develop these initiatives before operations began and the principle of adaptive management, which "counters the potentially paralysing effects of the precautionary principle on otherwise socially and economically useful projects" and responds to the fact that there are frequently information gaps when a decision is made.[15]

Projects routinely contain conditions that will be implemented during construction, operation, and decommissioning phases, including Indigenous monitoring plans, and courts have frequently relied upon forward-looking project conditions in determining the adequacy of consultation.[16] In *Taku River*, for example, the Supreme Court of Canada held that "project approval certification is simply one stage in the process by which a development moves forward" and, in determining that the duty to consult had been discharged, it relied on several forward-looking mitigation measures that were conditions of approval for the re-opening of an old mine, such as the development of more detailed base line

13. *Tsleil-Waututh,* at para. 661.

14. *Tsleil-Waututh,* at para. 471.

15. *Canadian Parks and Wilderness Society v. Canada,* [2003] F.C.J. No. 703 at para. 24.

16. *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.,* [2017] 1 SCR 1099 at para. 57 *["Chippewas of the Thames"]; Nunatsiavut v. Canada*, [2015] FC 492 at paras. 292-314, *Bigstone Cree Nation v. Nova Gas Transmission Ltd.,* [2018] FCA 89 at paras. 16 & 55- 59 *["Bigstone Cree"], Adam v. Canada*, [2014] FC 1185 at para. 93, 99, 101 & 104*; Prophet River First Nation v. British Columbia (Minister of Environment),* [2015] BCSC 1682 at para. 80.

information.[17] The Supreme Court of Canada similarly relied on forward-looking requirements for further consultation and reporting in upholding the adequacy of consultation in *Chippewas of the Thames*.[18]

In its review of the B.C. Ministers' approval of the TMX Project, the B.C. Supreme Court notably recently relied on similar forward-looking accommodation measures, such as a requirement for additional oil spill preparedness research, in determining that the duty to consult had been discharged with respect to the provincial Crown decision:

> "In this proceeding, the NEB process is the starting point, not the endpoint. Building on that process, British Columbia consulted with the Squamish in relation to the AC process as described above. That process did not answer all questions, but it did result in the imposition of additional conditions intended to accommodate Squamish's concerns, and providing for ongoing consultation. The duty to consult, of course is not thereby extinguished, but continues. (citations omitted)"
>
> ….The question is whether, viewing the process as a whole, British Columbia adequately considered Squamish's concerns arising from the process in coming to its decision. I find that it did. Squamish was afforded ample opportunity to communicate those concerns, and to comment on the EAO's responses. The conditions recommended by the EAO after consultation, adopted by the Ministers, included a number addressing the marine environment, oil spill preparedness, access through traditional territory, land uses for cultural and spiritual purposes and requirements for ongoing consultation reports from Trans Mountain.[19]

COURT GIVES NO WEIGHT TO FORWARD LOOKING ACCOMMODATIONS.

The Squamish First Nation notably also challenged the federal Crown decision and raised similar concerns with federal Crown consultation, particularly that it was premature to approve the project because there was not sufficient information known about the behaviour of diluted bitumen if spilled. The FCA came to a different conclusion than the B.C. Supreme Court holding, among other things, that the Government of Canada's Area Response Planning Initiative and ongoing research into the behaviour and potential impacts of a diluted bitumen spill in a marine environment "does not respond meaningfully to Squamish's concern that more needed to be known before the Project was approved." The FCA notes that there is nothing to show that Squamish's concern about diluted bitumen was given real consideration or weight, which is a questionable

17. *Taku River Tlingit First Nation v. British Columbia*, [2004] SCC 74 at para. 44-46.
18. *Chippewas of the Thames*, at para. 57.
19. *Squamish Nation v. British Columbia (Environment)*, [2018] BCSC 844 at paras. 170-172 [*"Squamish Nation"*].

conclusion given the B.C. government's condition for additional research regarding the behaviour and clean-up of heavy oils spilled in freshwater and marine aquatic environments and the federal government's Oceans Protection Plan, which included investing in oil spill cleanup research and methods to ensure that decisions taken in emergencies are evidence based.[20]

Reasonableness of the Decision

The FCA correctly determined based on existing jurisprudence that the adequacy of consultation must be reviewed on a reasonableness standard. This is not a standard of perfection and instead looks at whether "reasonable efforts were made to inform and consult."[21] Reasonableness is a deferential standard of review and the Crown must look at "totality of measures the Crown brings to bear on its duty of consultation," including consultation afforded in the regulatory process, by the proponent, and by government officials.[22]

While purporting to apply a standard of reasonableness, the FCA arguably verged more towards a standard of correctness in assessing the adequacy of consultation. Rather than taking a step back to assess the reasonableness and meaningfulness of the entire process, the FCA engaged in a detailed examination of the back and forth communications to assess whether the verbal dialogue between Indigenous groups and federal officials was meaningful. This is arguably a departure from the less granular analysis and more deferential approach than is typically applied in a reasonableness review, which looks at both the "existence of justification, transparency, and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law."[23] The FCA's reasons also effectively suggest that in at least some cases there needs to be a two-way dialogue between Indigenous groups and very senior government officials, without considering the practical implications of such a requirement for linear projects or whether the verbal dialogue would have been any more interactive if senior officials were engaging Indigenous groups.

This aspect of the decision also highlights the challenges of project

20. *Tsleil Waututh* at para. 482. It is important to note that the B.C. Supreme Court was only considering the adequacy of provincial Crown consultation for the TMX Project. The issues of whether the federal Crown discharged its duty to consult before the federal Cabinet approved the TMX Project was not before the B.C. Supreme Court. The Squamish also conceded in this case that it was not open to the B.C. Ministers to refuse to issue an approval to Trans Mountain but that they could have required additional information be obtained before a decision is made.
21. *Haida Nation v. British Columbia*, [2004] 3 S.C.R. 511 at para. 62 ["Haida"]; *Bigstone Cree* at para. 34; *Canada v. Long Plain First Nation*, [2015] FCA 177 at para. 133; *West Moberly First Nations v. British Columbia*, [2011] BCCA 247 at para. 197.
22. *Gitxaala Nation v. Canada*, [2016] FCA 187 at para. 183 and 214 and *Haida* at para. 62.
23. *Prophet River First Nation v. British Columbia*, [2017] BCCA 58 at para. 50.

review processes where a Minister or Cabinet is the final decision-maker but relies on the recommendation of an expert tribunal. While the FCA is correct that the Crown needs to be open to revisiting the findings and recommendations of the NEB, the Crown is also entitled to deference in its decision to rely on an expert tribunal particularly on issues like pipeline routing and should not be expected on a reasonableness standard to engage in a detailed reconsideration of each and every matter. This defeats the purpose of having an expert review process.

Written Reasons

While there continues to be some uncertainty around the scope of written reasons that may be necessary in the context of the duty to consult, the FCA also arguably went beyond existing jurisprudence by effectively requiring a written response from the federal government to every issue raised by the Indigenous groups.

In *Newfoundland Nurses*, the Supreme Court of Canada was clear that written reasons for administrative decisions do not need to address every argument raised and that a decision-maker is not required to address every issue raised or every finding relevant to its final conclusion.[24] Moreover, a reviewing court must first seek to supplement the reasons of the decision-maker before substituting its own decision and a reasonableness review requires "a respectful attention to the reasons offered or which could be offered in support of a decision."[25]

OUTLIER DECISION REQUIRES WRITTEN RESPONSE ON EVERY ISSUE.

In this case, there was no effort by the FCA to supplement the reasons of the Crown or look for reasons that could have been offered in support of the decision based on extensive record. For example, was it necessary for the Crown to provide additional reasons in response to the Squamish's concern about the behaviour of diluted bitumen when both the federal and provincial Crown's had undertaken to conduct additional research on this issue and the NEB had concluded that the likelihood of a large spill was unlikely?

It may be argued in the future that a different standard should be applicable for reasons relating to constitutionally protected Aboriginal and treaty rights and the Honour of the Crown. While this issue has not been definitively decided by the Supreme Court of Canada, it is important to note that this standard has been held by lower courts to be applicable to decisions engaging the duty to consult[26] and by the Supreme Court

24. *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador*, [2011] SCC 62 at para. 16.

25. *Trinity Western University v. Law Society of Upper Canada*, [2018] SCC 33 at para. 29 ["*Trinity Western*"].

26. See for example *Williams v. British Columbia*, [2018] BCSC 1425 at paras. 121-122; *Fort Chipewan v. Metis Nation of Alberta Local 125 v. Alberta*, [2016] ABQB 713 at paras. 466-471; *Bigstone Cree* at para. 65; *Squamish Nation* at paras. 185-186.

for decisions that engage *Charter* rights.[27] This issue will likely be further litigated but it is prudent in the meantime to ensure that there are responses to every issue raised including explanations for why specific accommodation measures or requests are not implemented.

Overall, it remains to be seen whether these novel aspects of the decision will establish a new standard or be an outlier although there is contrary jurisprudence on each point. There are also certain aspects of the decision that are more unlikely to be followed than others, such as the FCA's approach to accommodation. Either way, it is expected that courts will continue to place an increasing emphasis on the meaningfulness of consultation and thus it will be very important for proponents to demonstrate how the process was meaningful and responsive to the issues raised and to address as many issues as possible itself in order to reduce the number of issues that Crown officials need to address.

** Bryn Gray is a partner at McCarthy Tétrault specializing in Aboriginal law and a former Ministerial Special Representative on consultation and accommodation for Indigenous and Northern Affairs Canada*

27. *Trinity Western* at para. 29; *Ktunaxa Nation v. British Columbia*, [2017] 2 SCR 386 at para. 139-140.

Aboriginal Law

Aidan Cameron and Jack Ruttle

ATHABASCA CHIPEWYAN FIRST NATION V. ALBERTA, 2018 ABQB 262

In this case, the Alberta Court of Queen's Bench judicially reviewed a decision of the Aboriginal Consultation Office (ACO) that the duty to consult with the Athabasca Chipewyan First Nation was not triggered in relation to the Grand Rapids pipeline project proposed in Treaty 8 territory. The Alberta Energy Regulator had approved the pipeline in 2014.

Athabasca, a Treaty 8 First Nation, sought to quash the ACO's decision, but, novelly, neither asked for the matter to be returned to the ACO for reconsideration, nor challenged the regulator's approval of the project. Instead, it sought declarations about the ACO's policies and procedures applicable to whether the duty to consult is triggered, including the ACO's use of "consultation maps" when making that determination. The ACO had found that the duty to consult was not triggered on the basis of the pipeline's location on a map that identified areas where a duty to consult may, or may not, arise.

Due to mootness, the Court declined to make a declaration about whether the duty to consult was triggered. However, the Court did confirm that the ACO, as a Crown servant, has authority to decide whether the duty is triggered. The duty does not arise solely because of the taking up of land in a treaty area. Rather, when the "taking up" process occurs, the question is whether it may adversely impact a First Nation's exercise of its treaty rights. If there is no potential impact, the duty is not engaged. With respect to consultation maps, the Court noted that a map alone cannot be used to determine whether a duty to consult is triggered. It is a tool, but the ACO must also engage the First Nation to assess its claim independently of the map.

The Court also held that procedural fairness is owed in the determination of whether a duty to consult is triggered. Here, once the ACO understood that Athabasca believed there was a duty to consult, the ACO should have provided notice that it would be making a final determination on the issue. The ACO should also have outlined the procedure it would undertake in making its determination, the evidence required to meet the trigger test, and the applicable deadlines. Finally, once the ACO made its decision, it should have provided reasons that show it fully and fairly considered the information and evidence submitted by the First Nation.

EABAMETOONG FIRST NATION V. MINISTER OF NORTHERN DEVELOPMENT AND MINES, 2018 ONSC 4316

In this decision, the Ontario Superior Court set aside a permit authorizing mining exploration on the basis that consultation with the affected First Nation had been inadequate.

The Ontario Ministry of Northern Development and Mines (Ministry) granted the permit to Landore Resource Canada Inc. in March 2016, allowing Landore to do exploration drilling in Northern Ontario within the Treaty 9 territory of the Eabametoong First Nation. Eabametoong challenged the issuance of the permit on the basis that the Ministry had not discharged its duty to consult.

In setting aside the permit, the Court noted that the Ministry and its delegate, Landore, had created clear expectations as to how the duty to consult would be fulfilled in this case, but had then changed the process without meeting those expectations or offering any explanation.

The Court confirmed that while the Ministry has the right to change the course of the consultation process, it must do so in a way that upholds the honour of the Crown. The Ministry had not met this standard, and had altered the consultation process, such that it could no longer be considered a genuine attempt at "talking together for mutual understanding."

Key to the Court's conclusion was a private meeting between Landore and the Ministry, at which Landore told the Ministry it was in negotiations with another mining company and needed the permit as soon as possible. Based on the consultation that had taken place prior to the private meeting, Eabametoong had a reasonable expectation of a further community meeting and the negotiation of a memorandum of understanding before a decision on the permit would be made. After the private meeting, however, the Ministry advised Eabametoong that it would be issuing the permit, did not attempt to set up a community meeting, and gave no reasons for the changed approach.

Landore's permit application was remitted to the Ministry pending completion of adequate consultation.

MIKISEW CREE FIRST NATION V. CANADA (GOVERNOR GENERAL IN COUNCIL), 2018 SCC 40

In this decision, the Supreme Court of Canada determined that there is no duty to consult Indigenous groups at any stage of the law-making process.

The appeal concerned a judicial review by the Mikisew Cree First Nation relating to the former Conservative government's introduction of omnibus legislation in 2012 that amended several Canadian environmental and regulatory laws. The Mikisew Cree were not consulted on the amendments. They argued that the lack of consultation was a breach of the duty to consult, which they said was triggered because in developing and introducing legislation that reduced federal oversight on projects that may affect their treaty rights, the Ministers were acting in an executive (rather than a legislative) capacity.

The Court unanimously dismissed the Mikisew Cree's appeal, finding that the Federal Court lacked jurisdiction over the Mikisew Cree's claim because the *Federal Courts Act* does not allow for judicial review of parliamentary activities and actions of Ministers in the parliamentary process. However, the Court was divided on whether legislation could be challenged, once enacted, for a failure to consult Indigenous groups.

The majority (in three separate concurring decisions) ruled that there could be no duty to consult at any stage of the legislative process, including royal assent. Even once enacted, legislation cannot be challenged on the basis of a failure to consult Indigenous groups whose Aboriginal or treaty rights may be adversely affected by the legislation. The majority recognized a duty to consult at any stage in the legislative process would be contrary to parliamentary sovereignty, parliamentary privilege, and/or the separation of powers, which protect the law-making process from judicial oversight. It would also pose significant practical difficulties for the legislative process.

NO DUTY TO CONSULT AT ANY STAGE OF LAW-MAKING PROCESS.

In minority reasons, Justice Abella held that the enactment of legislation that has the potential to adversely affect asserted or established Aboriginal or treaty rights would give rise to a duty to consult and that legislation enacted in breach of that duty could be judicially challenged.

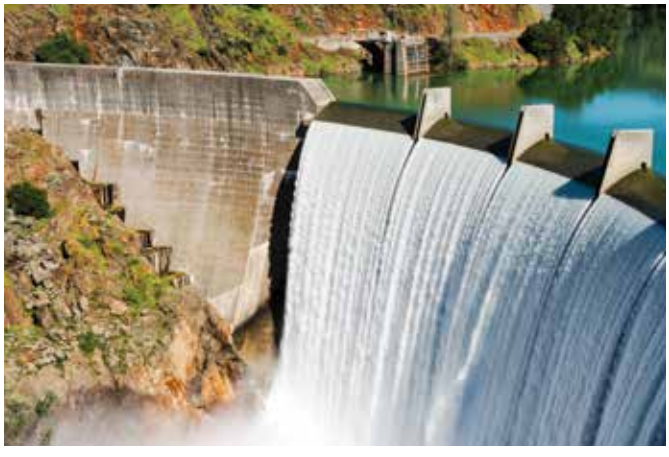
For more on the Court's multiple decisions in this case and their implications, see McCarthy Tétrault LLP's *Canadian ERA Perspectives* blog post entitled "No Duty to Consult Indigenous Groups on Legislation – Mikisew Cree First Nation v. Canada (Governor General in Council)."

WEST MOBERLY FIRST NATIONS V. BRITISH COLUMBIA, 2018 BCSC 1835

In this decision, the B.C. Supreme Court declined to grant the West Moberly First Nations an injunction prohibiting further work on the Site C hydropower project in B.C.

West Moberly is a signatory to Treaty 8, which grants traditional hunting, fishing and trapping rights. They oppose Site C on the basis that its environmental and ecological impacts will infringe these rights. West Moberly has previously challenged the project through a series of judicial reviews of the regulatory approvals Site C received. Those challenges were unsuccessful (see *Mining in the Courts,* Vol. VIII).

After the failed judicial reviews, West Moberly commenced an action against the province and B.C. Hydro in which they assert that Site C unjustifiably infringes their rights under Treaty 8. In the action, West Moberly seeks a permanent injunction prohibiting B.C. Hydro from continuing or completing work on Site C. In this particular application, West Moberly sought a temporary injunction, seeking to either prohibit all work on Site C for 24 months, or alternatively, work in 13 areas of critical importance to West Moberly's treaty rights.



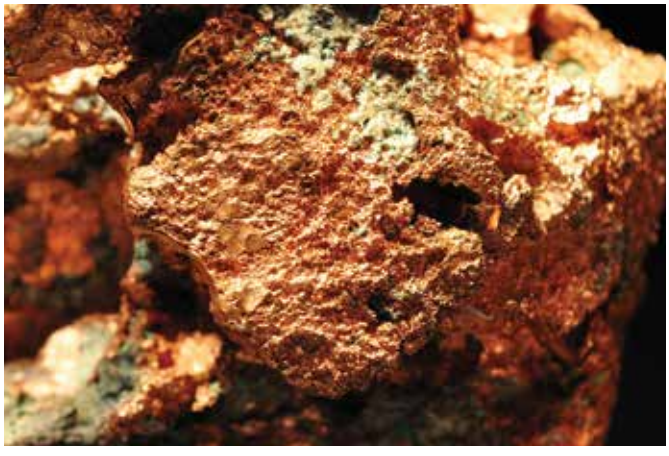
The Court refused to grant an injunction in either form. While West Moberly's underlying action presented a serious question to be tried, and the project presented a risk of irreparable harm, the balance of convenience weighed against granting an injunction and delaying Site C. Among other things, the Court warned that West Moberly's underlying action was not strong in law or on the evidence, and noted that the action was "inexcusably commenced" over two years after construction on Site C commenced. Further, the Court agreed with B.C. Hydro that if the Site C project was halted it would create chaos and cause irreparable harm to B.C. Hydro and Site C's many stakeholders.

Although no injunctive relief was granted, the Court did direct that the trial of West Moberly's action against the province and B.C. Hydro must be scheduled such that it would end no later than mid-2023, which corresponds to a key milestone in the Site C construction process.

WILLIAM V. BRITISH COLUMBIA, 2018 BCSC 1425

In this decision, the B.C. Supreme Court dismissed a petition by two First Nations seeking to quash the province of B.C.'s approval of further exploratory drilling by Taseko Mines Limited.

The petition arose out of a complex series of events relating to Taseko's attempts to progress development of the New Prosperity mine. The area, south of Williams Lake, B.C., is also land on which the Xeni Gwet'in First Nations Government and the Tsilhqot'in Nation hold proven Aboriginal hunting, trapping and trade rights.



Taseko had submitted a proposed plan for the mine to the provincial and federal governments for environmental assessment purposes. The federal government's assessment concluded that the project would have significant adverse environmental impacts, which would impact the Tsilhqot'in's exercise of proven Aboriginal rights, and therefore rejected Taseko's proposal. While Taseko submitted a redesigned project proposal, the province approved Taseko's exploratory permits. The Xeni Gwet'in and Tsilhqot'in challenged the province's decision on the basis that the province had breached its duty to consult and accommodate.

The Court noted the strength of the Aboriginal rights (being proven) and the extent of the potential interference with those rights. Together, this put the claim at the upper end of the spectrum of consultation and accommodation, and therefore a deep level of consultation was required. The province accepted this standard and had engaged in intensive consultation. However, the petitioners argued that the only reasonable outcomes the province could have reached at the end of consultation were to deny further exploratory drilling, or defer it until, or make it conditional upon, the federal government's approval of Taseko's redesigned project proposal.

In dismissing the petition, the Court concluded that the province's approach in approving exploratory drilling fell within the range of reasonableness. The Court reached its determination despite the outstanding federal review of Taseko's redesigned project.

In the result, Taseko's exploratory drilling was allowed to proceed, although the Court noted that there are more hurdles for Taseko to clear and further opportunities for balancing the parties' interests.

For another decision concerning this project, see the case summary for *Canada (Canadian Environmental Assessment Agency) v. Taseko Mines Limited*, 2018 BCSC 1034 on page 42 of this publication.

YAHEY V. BRITISH COLUMBIA, 2018 BCSC 123

In this notable pre-trial decision, the B.C. Supreme Court ordered the Blueberry River First Nations (BRFN) to produce its private agreements with industry, among other documents.

The decision came in the course of BRFN's Treaty 8 infringement claim against the province. BRFN asserts that the province is in breach of its obligations under Treaty 8 due to the cumulative impacts of development in BRFN's traditional territory. This is one of the first claims to allege treaty infringement on the basis of cumulative impacts to a First Nation's entire traditional territory.

The province sought production of documents by BRFN, including industry benefits documents, such as impact benefit and revenue sharing agreements, donations, and revenue received by BRFN from companies. The province argued such documents were relevant to the litigation because they demonstrated the extent that BRFN was responsible for, or acquiesced to, industrial developments, and because they spoke to the nature of the change foreshadowed by Treaty 8, how BFRN had adapted to the change over time, and how the province had managed the change honourably.

The Court agreed these documents were material to the larger litigation and ordered their production with some exceptions. In particular, the Court declined to order disclosure of documents relating to: (i) projects that BRFN objected to but which proceeded despite the objection; (ii) BRFN's requests for, and receipt of, capacity funding from industrial proponents; and (iii) agreements between companies owned and controlled by BRFN members and industry.

When this decision was released, the trial was scheduled to commence in March 2018. Since then, BRFN and the province have twice agreed to postpone the trial in order to continue negotiations. As of the last postponement, the trial was scheduled to commence in April 2019.

For more on this decision and the underlying litigation, see McCarthy Tétrault LLP's *Canadian ERA Perspectives* blog post entitled "First Nation ordered to produce private agreements with industry — update on Blueberry River First Nations Treaty 8 infringement proceedings."

Administrative Law

Aidan Cameron, Lindsay Burgess, Alexis Hudon, Camille Marceau and Angela Juba

ARCELORMITTAL EXPLOITATION MINIÈRE CANADA C. TRIBUNAL ADMINISTRATIF DU TRAVAIL, 2018 QCCS 1730

In this case, ArcelorMittal Exploitation minière Canada sought judicial review of the decision of the Tribunal administratif du travail (TAT) in an action for wage claims under the *Act Respecting Labour Relations, Vocational Training and Workforce Management in the Construction Industry* (Act) brought by the Commission de la construction du Québec.

In the decision under review, the TAT concluded that the extension of ArcelorMittal's rail line and other works are construction works within the meaning of the Act.

Applying a standard of reasonableness, the Court dismissed ArcelorMittal's application for judicial review. The Court held that the TAT's interpretation of the Act was consistent with decades of existing jurisprudence: the TAT applied the criteria set out in the jurisprudence to determine whether the railway is a "civil engineering work" as defined in paragraph (f) of the first subparagraph of s. 1 of the Act. One of these criteria concerns the general utility of the work. This criterion must be interpreted broadly and liberally. A work may be both of private utility in some aspects and of general utility in others. The TAT concluded that this was the case for the ArcelorMittal railway and that it must therefore be considered a "civil engineering work." The Court decided that the TAT's conclusions "are a perfect example of consistent and intelligible reasoning."

The Court also rejected the argument that the TAT had confused the notions of "utility" and public "interest." Further, it held that the TAT was justified in using a 1961 construction decree as an indicator of the legislator's intent: at the time, railways were not excluded from the scope of the construction industry. If the legislator's intention was to exclude them, it would have done so expressly as it did for other types of works: "The decision is justified, intelligible, reasoned and reasonable."

FORT HILLS ENERGY CORPORATION V. ALBERTA (MINISTER OF ENERGY), 2018 ABQB 905

In this case, the Alberta Court of Queen's Bench reviewed an Alberta Department of Energy decision concerning the calculation of the prior net cumulative balance (PNCB) of the Fort Hills Oil Sands Project under the *Oil Sands Royalty Regulation* (Regulation).

The Crown in Right of Alberta owns 97% of oil sands mineral rights in the province of Alberta. Pursuant to the Regulation, the Crown shares in the risk of development by taking only a minimum royalty until the point in time where cumulative revenues equal cumulative cost. Approvals issued under the Regulation permit an oil sands project to participate in this royalty regime. The Regulation also provides for recovery by the developer of PNCB, which is comprised of certain eligible start-up costs incurred prior to approval.

The Fort Hills Project (Project) was approved in 2002, with amendments to that approval in 2005 and 2009. When oil prices dropped significantly in late 2008, certain aspects of the Project were slowed. The mining portion of the Project remained on hold through Suncor's merger with Petro-Canada in 2009 and plans to continue the Project were not finalized until early 2011. In November of that year, the Project operator submitted an oils sands royalty application under the Regulation, which sought an effective date of November 1, 2011 and PNCB of more than C$1.8 billion. Alberta Energy approved the application, but revised the claimed PNCB to C$33,024,321, subject to audit. Alberta Energy completed its audit in 2015, and reduced the PNCB to nil.

On judicial review, the Court considered the reasonableness of the Minister's interpretation of certain sections of the Regulation, which had resulted in the exclusion of amounts from the PNCB, including s. 15(3)(a)(i) which provides for the exclusion of costs incurred during periods where a project was substantially suspended or abandoned. Alberta Energy had relied on this provision to deny C$947,627,057 in incurred Project costs on the basis that the Fort Hills Project was "substantially suspended" in the 2008 to 2011 period. Alberta Energy made this determination on the basis of, among other things, slowed spending on the Project in 2008 through 2011 and a November 2008 announcement of the suspension of the Sturgeon Upgrader and Sanction Extension. The Court found Alberta Energy had misconstrued the latter announcement as a suspension of the Fort Hills Project. The Court also found that a number of steps were taken, and significant expenditures made, in respect of the Fort Hills Project from 2008 to 2011, which were inconsistent with suspension of the Project's development.

In the result, the Court remitted the matter back to the Minister to determine the Project's PNCB in accordance with the Regulation.

MUNICIPALITÉ RÉGIONALE DE COMTÉ DE MATAWINIE C. MINISTRE DE L'ÉNERGIE ET DES RESSOURCES NATURELLES, 2018 QCCS 4054

This case involved a judicial review of a decision by Québec's Minister of Energy and Natural Resources to renew an exclusive operating lease.

In 2010, the Minister entered into an agreement to delegate to the Municipalité régionale de comté de Matawinie (MRC) certain of its powers under the *Mining Act (Québec)* including the granting, renewal and revocation of sand and gravel leases.

In 2011, the MRC granted an exclusive operating lease to 9212-220 Québec Inc. In 2016, the MRC refused to renew this lease. But the following month, the Minister overruled the MRC and renewed the operating lease. The MRC commenced judicial review proceedings to challenge the Minister's decision to overrule it and renew the lease. 9212-220 Québec inc. filed a separate appeal of the MRC's decision, in accordance with s. 295 of the *Mining Act* which provides that any holder of a mining right affected by a decision has a right of appeal.

The MRC argued that the Minister cannot exercise a power that it has delegated and cannot substitute its own decision for a decision of the MRC in an area where the Minister has delegated authority to the MRC. Thus, in the MRC's view, the renewal issued by the Minister was void. The Minister argued that even where it has delegated power, it remains free to impose its standards, guides, guidelines and procedures on the exercise of delegated authority. The Minister also maintained that it is open to the Minister to revoke delegated authority if a delegate does not follow the Minister's standards, guidelines and procedures.

The Superior Court of Québec allowed the MRC's appeal. The Court held that the question of whether or not the Minister had the authority to consent to the renewal of the lease must be assessed on a standard of correctness. The Court concluded that the Minister did not have the power to substitute its decision for that of the MRC and thus to renew the lease, because the delegating legislation did not specifically provide the Minister with such authority. The Court pointed out that where a delegating authority retains the power to overrule a delegate's decision-making, that authority is typically clearly articulated in the delegating legislation or agreement. The Minister's decision was therefore *ultra vires*, and the renewed lease null and void.

Class Actions

Aidan Cameron, Alexis Hudon, Camille Marceau and Angela Juba

TROTTIER C. CANADIAN MALARTIC MINE, 2018 QCCA 1075

In this decision, the Court of Appeal of Québec upheld a Superior Court judge's ruling allowing Canadian Malartic Mine's representatives to meet with class members to present them with individual out-of-court settlement offers.

Canadian Malartic Mine operates the largest open-pit gold mine in Canada, near Malartic, Québec. Before the class proceeding was filed, Malartic Mine implemented a program for city residents to receive compensation for nuisances resulting from mining activities. The program, developed in consultation with community members, provided compensation to eligible city residents for nuisances up to December 31, 2016, and then every year thereafter until 2028.

In August 2016, a class action was filed by residents who sought compensation through the judicial process instead of the program. The class proceeding was not authorized until nine months later. Before the class action was authorized, 83% of city residents elected to apply for and receive compensation under the program for the first period through December 31, 2016. In order to receive the compensation, the residents had to sign a release and undertake to exclude themselves from any legal action for the period covered by the release. In September 2017, the defendant sought a declaratory judgment confirming its right to communicate with class members to offer them compensation pursuant to the program for the year 2017. The plaintiff opposed, arguing that this would violate the rules established by the Code of Civil Procedure (CCP) governing settlements in the class action context.

The Superior Court judge ruled that the defendant could communicate with class members to present individual settlement offers. Here, the opt-out period had not been set by the Court as the period covered by the class action had not yet been determined. The judge found it would be contrary to the rights of class members to prohibit them from settling their dispute with the defendant out of court. The plaintiff appealed, arguing that the Superior

Court judge's decision went against the philosophy of class actions, and effectively declared a partial settlement of the class action without following normal settlement approval process outlined in s. 590 of the CCP.

The Court of Appeal disagreed. It confirmed that a class member is not obliged to be a party to a class action. Until the opt-out period expires, which had not occurred here, class members have the right to decide to opt out of a class action and enter into a settlement with the defendant. Only class members who decide not to opt out are subject to the rules governing class actions, including s. 590 CCP, which subjects the settlement to the Court's approval. The Court also held that the case was distinguishable from other cases such as *Filion c. Québec (Procureur général)*, in which the court held that defence counsel is not authorized to communicate directly with class members.

For more on this decision, see McCarthy Tétrault LLP's *Canadian Class Actions Monitor* blog post entitled "Court of Appeal of Québec Upholds Decision Allowing Defendant to Present Individual Settlement Offers to Class Members."

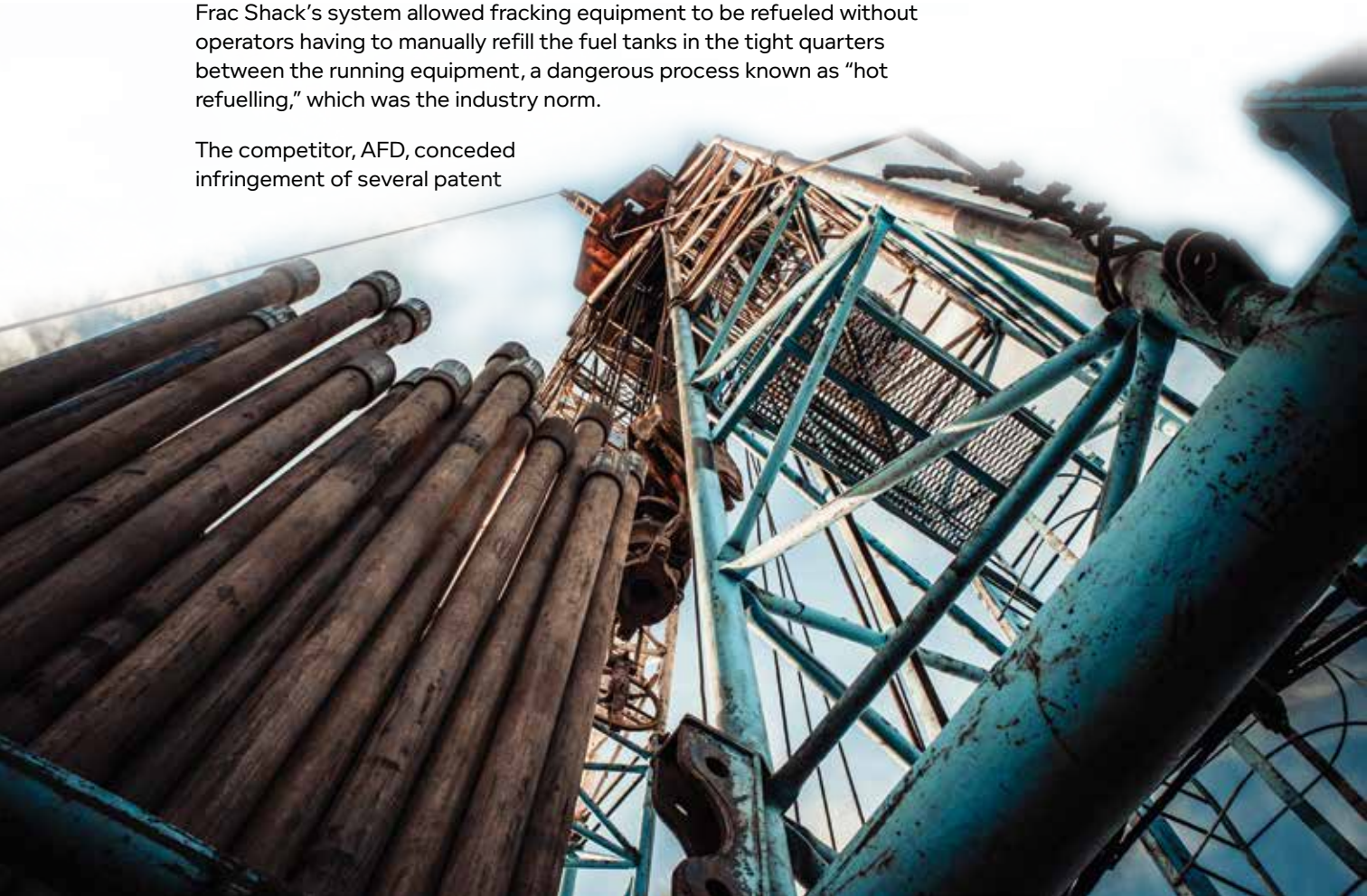
There and Back Again: Frac Shack Once Again Victorious in Patent Infringement Case

Timothy St. J. Ellam, Q.C., Steven Tanner, James S.S. Holtom, Kaitlin Soye

Patents can be among the most valuable assets natural resource companies own. The time-limited monopoly right granted by a patent can preserve market exclusivity, can be used as a sword to ward off competing businesses, and are especially important for single-product companies. Despite these significant benefits, patent litigation is highly technical, involving both cutting-edge technologies and a specialized legal regime. As the *Frac Shack* cases show, successfully navigating the complexities of patent litigation requires experienced counsel.

In last years' edition of *Mining in the Courts*, we provided an overview of the Federal Court's recently released decision *Frac Shack Inc. v. AFD Petroleum Ltd.*, 2017 FC 104. In that case, Frac Shack, a single-product company, had successfully sued a competitor for infringing a patent covering Frac Shack's innovative fracking equipment refueling system. Frac Shack's system allowed fracking equipment to be refueled without operators having to manually refill the fuel tanks in the tight quarters between the running equipment, a dangerous process known as "hot refuelling," which was the industry norm.

The competitor, AFD, conceded infringement of several patent



claims, subject to attempting to invalidate them, on the theory that an invalid claim cannot be infringed.

Justice Manson rejected AFD's allegations, holding that several claims were valid and infringed. The Court awarded Frac Shack an accounting and disgorgement of AFD's profits, reasonable compensation for the period between publication of the application and patent issuance, and a permanent injunction restraining any further infringement until the patent expires in 2030.

AFD appealed to the Federal Court of Appeal, which allowed the appeal, in part (2018 FCA 140). While AFD alleged many errors on appeal, only one found favour with the Court — the Federal Court's definition of the "person skilled in the art." It is well-recognized that patents must be read and understood from the perspective of a notional person skilled in the art of the field of the patent. That person is not a member of the general public. Rather, the person skilled in the art is involved in the field of the invention and knows all of the common general knowledge of those who work in the field. They also keep up-to-date on advances in the field, in this case hydraulic fracking equipment refuelling.

The Court of Appeal held that the Federal Court had used irreconcilably inconsistent definitions of the person skilled in the art in different places in the decision and allowed the appeal on this narrow issue. At one paragraph, the Federal Court had held that the person skilled in the art "would have some experience designing fueling equipment" for hydraulic fracking equipment, yet later in the decision, this experience was entirely omitted from the Federal Court's discussion of the attributes of the person skilled in the art. The definition of the person skilled in the art could have impacted the Federal Court's construction of three critical claim elements — "automatically operable valves," "automatic fuel delivery" and "fuel cap" — as well as the Federal Court's obviousness analysis, step one of which is to identify the person skilled in the art and her or his common general knowledge. Since these issues are factually suffused, requiring an appreciation of the record and witnesses at trial, the Federal Court of Appeal remitted all three issues back to the Federal Court judge. The Federal Court of Appeal also cautioned that obviousness was to be assessed claim-by-claim.

PERSPECTIVE OF 'PERSON SKILLED IN THE ART' KEY TO PATENT INTERPRETATION.

On remand, the Federal Court issued the identical decision as it had originally (2018 FC 1047). The Federal Court explicitly incorporated its earlier finding that the person skilled in the art had experience designing fueling equipment into its definition of the skilled person throughout its decision, construed the claim elements exactly as in the 2017 decision and held that the patent claims were not obvious. As the Federal Court explained, if an independent claim is not obvious, narrower dependent claims cannot be obvious.

Interestingly, AFD argued that an earlier Federal Court of Appeal case, *Ciba Specialty Chemicals Water Treatments Limited v. SNF Inc.*, 2017 FCA 225, had changed the law of obviousness pronounced by the Supreme Court of Canada. AFD also argued that it was entitled to determine the state of the art for the purposes of obviousness. The Federal Court rejected both arguments.

AFD has again appealed the Federal Court's decision to the Federal Court of Appeal.

Frac Shack highlights a peculiar pattern in oil field technology patent litigation for the Federal Court of Appeal to allow appeals and remit matters back to the Federal Court. Other examples include the *Weatherford Canada Ltd. v. Corlac Inc.* series of decisions, in which the Federal Court of Appeal has twice remitted a decision involving the infringement of a patent covering the sealing assembly for rotary oil well pumps back to the Federal Court (see 2010 FC 602, rev'd 2011 FCA 228, 2012 FC 261, rev'd 2012 FCA 261, 2018 FC 565), and *Zero Spill Systems (Int'l) Inc. v. Heide*, in which the Federal Court of Appeal also remitted several issues back to the Federal Court (2013 FC 616, rev'd 2015 FCA 115). While patents remain an important asset for natural resource companies, it is important to recognize the complexity and possible risk associated with patent litigation.

Case Law Summaries

Contracts

Aidan Cameron, Lindsay Burgess, Alexis Hudon, Camille Marceau and Angela Juba

CANLIN RESOURCES PARTNERSHIP V. HUSKY OIL OPERATIONS LIMITED, 2018 ABQB 24

In this decision, the Alberta Court of Queen's Bench dealt with the interpretation of a right of first refusal contained in a joint venture agreement.

Canlin Resources Partnership, Husky Oil Operations Limited and Canadian Natural Resources Limited were joint venture participants in the Erith Dehydration and Flow Splitter Facility (Facility) and successor parties to the Construction, Ownership and Operation Agreement (Agreement) that governed the operations of the Facility. Between 2014 and 2016, Husky had shut down and decommissioned the dehydrator unit of the Facility and installed a "jumper" pipeline that bypassed the inlet separation and flow splitter unit. Since 2016, the gas that was previously processed at the Facility was flowed to, and processed at, a different facility instead. Although Canlin had pressed for the Facility to become operational and had expressed interest in assuming ownership and operations of the Facility, Husky firmly maintained its position that the Facility should remain in its current shut-in, non-operational status.

The joint venture agreement provided Canlin with a right of first refusal if either of the other joint venture parties wished to sell its interest in the Facility, subject to an exception: an owner may transfer all or a part of its interest in the Facility without providing a right of first refusal where the disposition made by the owner is "… of all or substantially all … of its petroleum and natural gas rights in wells producing to the Facility …." In September 2017, Husky gave Canlin notice of its intention to sell certain of its assets, including its interest in the Facility, to Ikkuma Resources Corp. Husky took the position that the exception applied to the Ikkuma transaction, such that Canlin was not entitled to a right of first refusal. Canlin disagreed, and sought relief in the Court of Queen's Bench.

The Court found in favour of Canlin, holding that Canlin was entitled to a right of first refusal notice and specific performance of that right. In so doing, the Court refused to read the phrase "wells producing to the Facility" as "wells associated with the Facility" as suggested by Husky on the basis of annotations to the model agreement that the Agreement at issue was based upon. Considering the ordinary and grammatical sense of the phrase, the Court held that "wells producing to the Facility" means wells that are actually being processed by the dehydrator and inlet separation and flow splitter units of the Facility. The Court found this interpretation to be consistent with the Agreement as a whole, which has as its purpose the use of the Facility for functions of flow splitting and

dehydration. As the wells were not utilizing those capabilities, but rather were "producing" to another operational facility, they could not be said to be "producing to the Facility."

ILLIDGE V. SONA RESOURCES CORPORATION, 2018 BCCA 368

This is an appeal from a decision reviewed in *Mining in the Courts*, Vol. VIII, in which the British Columbia Supreme Court was asked to determine the time by which a party was required to obtain a bankable feasibility study in circumstances where the parties had not agreed on a specific date.

The plaintiffs granted options to purchase several properties known to contain gold to Sona Resources Corporation, a junior mining company. A condition of the agreements was that Sona obtain a bankable feasibility study before it could obtain full rights and title to the properties. No specific date was attached to this requirement. Over the next 12 years, Sona spent over C$6.4 million exploring the property, but did not obtain a bankable feasibility study. The plaintiffs sought to terminate the agreements.

The B.C. Supreme Court held that the plaintiffs could not terminate the agreements on the basis of the undelivered study. Considerable effort is required to obtain a feasibility study. The requirement to do so must be fulfilled within a "commercially reasonable period," having regard to the exploration and development activities necessary to obtain the study, as well as prevailing economic, gold and market conditions. Though 15 years had passed since the agreements were entered, this period had yet to expire. The Court decided that it would also be inappropriate to imply a "time is of the essence" term in this case, given the inherent difficulties in advancing a mineral property to the stage of a bankable feasibility study.

The Court of Appeal allowed the plaintiffs' appeal, but only to the extent of replacing a term of the underlying order with a term dealing with the issue of reasonable time for completion of the study. While the Court declined to interfere with the trial judge's conclusion that a reasonable time for completion of the bankable feasibility study had not passed, it found the trial judge had erred in holding that it was not possible to determine a reasonable time for performance. The Court granted leave to the parties to make further submissions on this term in writing. Absent persuasive submissions, the Court noted a deadline of December 31, 2020 would be viable, which would be comprised of two additional exploration seasons plus some time for writing.

LANDRY (LUNIK EXPLORER) C. FIELDEX EXPLORATION INC., 2018 QCCS 3235

This case concerned a claim for damages flowing from a breach of contract.

The defendant, Fieldex Exploration inc., was a mineral exploration and map staking company. Around 2009, the People's Republic of China announced its intention to restrict its exports of rare earth minerals, which caused a sudden craze for the minerals. Fieldex possessed mining rights in an area where rare earth minerals had been discovered. Luc Landry, doing business under the name Lunik Explorer (Landry) was engaged in exploration activities for the benefit of various mining companies. Landry approached Fieldex to acquire its mining rights, and the parties entered into a contract for 232 mining rights of six prospectors. According to Landry, it was a purchase agreement. Fieldex claimed it was a contract with an option to purchase.

Landry did not obtain the mining claims from all six prospectors and only 227 mining claims, instead of 232 claims, were ever transferred to Fieldex. In January 2011, the remaining five claims expired and reverted back to the public land sphere. In the summer of 2011, Landry was informed that Fieldex did not intend to pay the sum of C$100,000 to pursue its option on the 232 mining rights and intended to terminate the agreement if its financial terms were not amended. Fieldex proposed to Landry that all mining rights be transferred back to him. Landry refused this offer. Instead, 151 mining rights expired from February 2011 to July 2012. Landry commenced an action, and Fieldex counterclaimed for abuse of process.

The Court concluded on the facts of the case that the contract was an option agreement. The Court found that Landry knew in 2011 that his mining rights no longer had the same appeal and that it was for this reason that he refused to have Fieldex transfer the mining rights back to him. Indeed, that same year, the People's Republic of China decided to forgo its restriction on its exports of rare earths. Landry knowingly allowed 151 mining rights to expire without taking any action. The Court also granted Fieldex's counterclaim for abuse of process.

MEGA REPORTING INC. V. YUKON (GOVERNMENT OF), 2018 YKCA 10

In this decision, the Yukon Court of Appeal unanimously upheld a waiver of liability clause in the Yukon government's Request for Proposal (RFP) that was challenged by an unsuccessful bidder.

In 2013, the Yukon government issued an RFP seeking bids for a one-year contract for court transcription services. The RFP explicitly provided that the process was subject to the Yukon Contracting and Procurement

Directive, which sets out various principles for public procurement, including commitments to fairness, openness, transparency, and accountability. The RFP also included a clause purporting to waive the government's liability for any costs associated with unfairness in the RFP process, except as awarded through a "Bid Challenge Process."

The tendering process had two stages: (i) a technical evaluation of the bidder's experience and performance; and (ii) for each bid that met the minimum technical criteria, an assessment of the price. The evaluation committee determined that Mega Reporting Inc. did not pass the first stage, so it did not consider its (lower) bid price and another bidder was selected. There was no evidentiary record of the evaluation, but Mega later learned that it lost points for criteria not disclosed in the RFP. Mega sued the government, alleging that it breached its duty to fairly review its proposal. The Yukon Supreme Court held that the government failed to meet its duties of fairness, accountability, and transparency, both at common law and under the Directive. In addition, applying the test from *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, the Court found that public policy reasons justified refusing to enforce the waiver of liability clause and awarded Mega damages in excess of C$300,000. The Yukon government appealed.

BID AT YOUR OWN RISK: WAIVER OF LIABILITY IN RFP UPHELD.

The Court of Appeal overturned the ruling, finding that the trial judge erred by not considering that the public policy must be "substantially incontestable" to justify not enforcing a waiver of liability clause. Even if the trial judge believed that one policy interest (avoiding unfair tendering) outweighed the other (enforcing contracts), the legal test is not a balancing act. The law sets a high bar to defeat an otherwise valid exclusion clause, and the bar was not met in this case. Although the Court found it was not substantially incontestable that the public interest in ensuring fair procurement overrides the government's ability to protect itself from liability, cases that have risen to that level involved clauses excluding liability for human rights violations or fraud. In contrast, Mega was a sophisticated business party, which chose to participate in a bidding process with an exclusion of liability clause and no public policy interest justified depriving the government of the exclusion clause that Mega had accepted. The Court further distinguished Tercon, noting that the exclusion clause clearly and unambiguously excluded liability for any costs associated with unfairness in the RFP process.

For more on this decision see McCarthy Tétrault LLP's *Canadian Appeals Monitor* blog post entitled "'Bid At Your Own Risk': Yukon Court of Appeal in Mega Reporting upholds waiver of liability in government procurement process." Mega Reporting has sought leave to appeal to the Supreme Court of Canada.

Criminal

Aidan Cameron and Lindsay Burgess

R. V. PAVAO, 2018 ONSC 2506

In this criminal case, Carlos Alberto Pavao was found guilty of defrauding 10 investors in respect of the sale of shares in two gold mining companies, as well as one count of defrauding the public. Key to finding Mr. Pavao guilty was the Court's assessment that he was an unreliable and untruthful witness.

Mr. Pavao, a successful businessman, was the principal of 6048382 Canada Inc. (604) and the sole signatory on the corporate bank account. In 2005, a small group of people began investing in mineral stocks, with the funds to purchase shares being funnelled through 604. The charges in this case involved the shares in two companies: Rubicon Minerals Corporation, a public company that owned a gold mine in Northern Ontario, and Africo Resources Ltd., a gold and mineral exploration company owned and controlled by Rubicon until 2006, when it went public.

In 2004, Mr. Pavao and Sam Lawrence, an employee of Mr. Pavao's cleaning business, invested C$500,000 through 604 to purchase 614,401 common shares in Africo offered through a private placement. Mr. Pavao later approached two customers of his cleaning business and persuaded them to invest in Africo. Both customers thought they were purchasing Africo shares that Mr. Pavao already owned. They advanced funds to 604 for this purpose and signed subscription receipts, but were never provided with the share certificates. Mr. Pavao and Mr. Lawrence directed the Africo shares held in 604 to be transferred into their own personal accounts. The Court found Mr. Pavao did this knowingly and was found guilty of defrauding these two investors in respect of the Africo shares.

In 2007, Rubicon sought to raise funds through a private placement. Up until this point, a small group had been investing in Rubicon shares through 604. Mr. Pavao and Mr. Lawrence asked for as large a piece as possible in the private placement, but only C$100,000 was made available to the 604 group. Mr. Pavao took the shares for himself and directed the shares be placed in his own personal trading account. No shares were purchased by, or on behalf of, 604. Furthermore, no additional shares were available for either 604 or Mr. Lawrence to purchase. Mr. Pavao also persuaded investors to invest in Rubicon shares through 604, in part on representations by Mr. Pavao that he had access to C$1.5 million in Rubicon shares through the 2007 private placement. In this way, Mr. Pavao deceived these investors into paying for shares that did not exist. Mr. Pavao was found guilty of defrauding these investors with respect to the Rubicon shares. In addition, the Court found Mr. Pavao had made the opportunity available to the public by inviting investors to recruit others, and thereby had defrauded the public.

Enforcement of Judgments and Awards

Aidan Cameron and Lindsay Burgess

YAIGUAJE V. CHEVRON CORPORATION, 2018 ONCA 472

This decision is another chapter in the ongoing litigation concerning the enforcement of an Ecuadorian judgment in Ontario against Chevron and Chevron Canada, a wholly-owned subsidiary of Chevron. Earlier decisions in the case are discussed in *Mining in the Courts*, Vols. VI and VIII.

In 2015, the Supreme Court of Canada held that Ontario courts have jurisdiction to adjudicate a recognition and enforcement action against an Ontario affiliate of a foreign corporation. However, the SCC left open the question of whether the assets of Chevron Canada, as a separate entity from Chevron, remained available to satisfy the Ecuadorian judgment. That matter was determined in the first instance in 2017 by the Ontario Superior Court of Justice (2017 ONSC 135), which held that Chevron Canada's assets were unavailable to satisfy the judgment because Chevron Canada is not an asset of Chevron, and the Ontario *Execution Act*, which the plaintiffs relied on, is procedural and does not create a right to an asset not owned by the judgment-debtor. The Court refused to pierce the corporate veil to allow for enforcement. The principle of corporate separateness precluded this because the plaintiffs could not show that Chevron completely controlled Chevron Canada in order to use it as a shield for an improper or fraudulent purpose. The plaintiffs appealed from that decision.

In dismissing the appeal (with the exception of the costs award), the Ontario Court of Appeal dealt with two major issues: (i) the proper interpretation of the *Execution Act*, and (ii) whether the Court has the ability to pierce the corporate veil when the interests of justice demand it.

On the first issue, the Court held that it was legally impossible to grant the appellants' request for a declaration against Chevron Canada that its shares were exigible because a corporation's shares belong to the shareholders, not to the corporation. The *Execution Act* is procedural

and does not purport to grant substantive rights to judgment creditors. It was not enough that Chevron had an "amorphous indirect right" to the assets of Chevron Canada. There must be an existing legal right that permits the seizure of the assets. In its analysis, the Court considered the well-entrenched notion of corporate separateness, and held that where a judgment debtor is a parent corporation, it and not its shareholders or subsidiaries, is responsible for the debts it incurs.

On the second issue, the majority bluntly dismissed the appellants' argument, stating that the Court has "repeatedly rejected an independent just and equitable ground for piercing the corporate veil." An exception to the rule of corporate separateness only occurs when: (i) the parent corporation has complete control of the subsidiary such that it is a "mere puppet" of the parent; and (ii) the subsidiary was incorporated for a fraudulent or improper purpose. Absent such extraordinary circumstances, the corporate veil cannot be pierced. In the end, the Court re-affirmed the test for piercing the corporate veil and rejected the independent "just and equitable" grounds for doing so. While the majority conceded that the rules for piercing the corporate veil can and will evolve, it must do so on a "principled basis and in a manner that brings certainty and clarity, not in a way that sows confusion and is devoid of principle."

WHOLLY OWNED SUBSIDIARY NOT RESPONSIBLE FOR PARENT'S DEBTS.

This may not be the final word on the doctrine of corporate separateness and the circumstances in which the corporate veil may be pierced, as the plaintiffs have sought leave to appeal to the Supreme Court of Canada.

For more on this decision see McCarthy Tétrault LLP's *Mining Prospects* blog post entitled "Yaiguaje v. Chevron Corporation – The Ontario Court of Appeal Does Not Pierce the Corporate Veil, but the Concurring Minority Questions the Principle of Corporate Separateness."

The End of a Long and Winding Road: Federal Ban on Asbestos Now in Force

Selina Lee-Andersen

On December 30, 2018, the federal *Prohibition of Asbestos and Products Containing Asbestos Regulations* (Regulations) came into force, which prohibit the import, sale and use of asbestos, as well as the manufacture, import, sale and use of products containing asbestos, subject to certain exceptions. The Regulations are published under the authority of the *Canadian Environmental Protection Act, 1999* (CEPA 1999). Since the Regulations are more stringent than existing regulatory controls under the *Asbestos Products Regulations* made under the *Canada Consumer Product Safety Act*, the *Asbestos Products Regulations* were repealed when the Regulations came into force. In addition, the *Export of Substances on the Export Control List Regulations* have been amended to list all forms of asbestos on the Export Control List (Schedule 3 to CEPA 1999). These amendments support the Regulations by adding new provisions to prohibit the export of asbestos and products containing asbestos, subject to the exemptions described in further detail below. They also ensure that Canada is compliant with its export obligations under the *Rotterdam Convention*, which is a global treaty designed to protect human health and the environment by establishing a "prior informed consent" procedure for listed chemicals. All forms of asbestos are listed under the *Rotterdam Convention* with the exception of chrysotile asbestos, which will be considered for inclusion by parties to the *Rotterdam Convention* in 2019. Through this procedure, parties must not export a substance to another party that has stated it does not consent to the import. Importing parties may also give their consent to import with conditions that exporting parties must meet.

History of Asbestos in Canada

Asbestos is the commercial term used to describe a set of six naturally occurring silicate minerals (chrysotile, amosite, crocidolite, anthophyllite, tremolite, and actinolite). Asbestos is currently listed in the List of Toxic Substances found in Schedule 1 to CEPA 1999; the listing covers all six types of asbestos. Given the performance capabilities of asbestos — it is resistant to high temperatures, chemical degradation and wear, and insulates against heat and electricity — it was used widely before asbestos exposure was known to pose health risks. Prior to 1990, asbestos was used primarily for insulating buildings and homes against cold weather and noise, as well as for fireproofing. Asbestos has also been used in industrial products such as:

- cement and plaster;
- industrial furnaces and heating systems;
- building insulation;
- floor and ceiling tiles;
- house siding;
- car and truck brake pads; and
- vehicle transmission components, such as clutches.

There is currently no mining of asbestos in Canada. The last two remaining asbestos mines, both located in Québec, ceased operations in 2011.

Asbestos is a mineral that can be crumbled, pulverized or powdered when it is dry (friable), which can result in small fibres and clumps of fibres being released into the air. According to Health Canada, the inhalation of airborne asbestos fibres poses a health concern and can cause:

- asbestosis (a disease that involves scarring of the lungs and makes breathing difficult);
- mesothelioma (cancer of the lining of the chest or stomach cavity); or
- lung cancer.

A number of factors may determine how exposure to asbestos will affect an individual (including the dose, duration, source, type of asbestos, and pre-existing health condition or smoking), and it can take decades after the first exposure to asbestos fibres for the related condition to develop.

In the update to the five occupational health and safety regulations under the *Canada Labour Code*, Part II (including the *Canada Occupational Health and Safety Regulations* (COHSR), *On Board Trains Occupational Health and Safety Regulations, Oil and Gas Occupational Safety and Health Regulations*, *Maritime Occupational Health and Safety Regulations*, and *Aviation Occupational Health and Safety Regulations*), the occupational exposure limit (OEL) for chrysotile asbestos was reduced from one fibre

per cubic centimetre (f/cc) to 0.1 f/cc and the requirement of an asbestos exposure management program was added. Employment and Social Development Canada has produced a *Technical Guideline to Asbestos Exposure Management Programs*, which provides guidance on asbestos issues relating to Part X of the COHSR and to relevant provisions in other Regulations pursuant to the *Canada Labour Code*, Part II. Each province and territory also has occupational health and safety legislation addressing risks from exposure to asbestos.

Updated Approach to Asbestos Management

In December 2016, the federal government announced a government-wide strategy to manage asbestos, including the development of new regulations under CEPA 1999 to prohibit the manufacture, use, import and export of asbestos and products containing asbestos by 2018. These new regulations would seek to prohibit all future activities respecting asbestos and products containing asbestos, including, the manufacture, use, sale, offer for sale, import and export. There was a 30-day consultation period associated with this publication. Comments received on this publication were considered in the development of the consultation document. To that end, a notice was issued in the *Canada Gazette*, Part I: Vol. 150, No. 51 - December 17, 2016 under s. 71 of CEPA 1999. The notice applied to all six types of asbestos: crocidolite asbestos, chrysotile asbestos, amosite asbestos, actinolite asbestos, anthophyllite asbestos and tremolite asbestos. Every person to whom the notice applied was required to comply no later than January 18, 2017. The purpose of the s. 71 notice was to obtain information on the manufacture, import, export and use of asbestos and products containing asbestos for the 2013 to 2015 calendar years, as well as socio-economic information. This data was considered in the development of the regulations and will ensure that future decision-making is based on the best available information.

REGULATIONS DO NOT PROHIBIT MINING WHERE ASBESTOS MAY BE FOUND.

In April 2017, Health Canada and Environment and Climate Change Canada (ECCC) published a consultation document on the proposed regulatory approach to prohibit asbestos and products containing asbestos. Comments and information received in response to the consultation document were considered in the development of the proposed regulations. The proposed regulations were published in January 2018 in the *Canada Gazette*, Part I for a 75-day public comment period. Comments and information received during the comment period were considered in the development of the final regulations, and are summarized in the Regulatory Impact Analysis Statement.

Key Elements of the Regulations

The Regulations prohibit the import, sale and use of asbestos and the manufacture, import, sale and use of products containing asbestos, with certain exceptions. The Regulations do not prohibit mining activities where asbestos may be found, nor do the Regulations prohibit the use and sale of asbestos and products containing asbestos that were installed prior to the coming into force of the Regulations (such as asbestos and products containing asbestos installed in buildings, civil engineering works, vehicles, ships, and airplanes). Also, the Regulations do not apply to pest control products, which are regulated under the *Pest Control Products Act*. Further, the Regulations do not apply to mining residues except for the following activities, which are prohibited:

- sale and use of asbestos mining residues for construction and landscaping activities, unless authorized by the province in which the construction or landscaping is to occur; and
- use of asbestos mining residues to manufacture a product that contains asbestos.

The Regulations specifically exclude the following:

- a time-limited exclusion for the import and use of processed asbestos fibres in a chlor-alkali facility that was in operation on the day on which the Regulations came into force, until January 1, 2030;
- possession of asbestos or products containing asbestos being transferred for disposal;
- reuse of asbestos in the restoration of asbestos mining sites or in road infrastructure, if that asbestos was integrated into road infrastructure before the Regulations came into force;
- the import, sale or use of military equipment that was serviced with a product containing asbestos if the product was used to service the military equipment while it was outside Canada for the purposes of a military operation and there was no technically or economically feasible asbestos-free alternative available at that time;
- the import, sale or use of products containing asbestos to service military equipment before January 1, 2023, if there is no technically or economically feasible asbestos-free alternative available when the product is imported, sold or used;
- the import, sale or use of a product containing asbestos to service equipment of a nuclear facility before January 1, 2023, if there is no technically or economically feasible asbestos-free alternative available when the product is imported, sold or used;
- asbestos or products containing asbestos to be displayed in a museum; and

- asbestos for use in a laboratory (for analysis, scientific research or as a laboratory analytical standard).

It should be noted that these excluded activities are subject to notification, reporting and record-keeping requirements. In addition, the Regulations include a requirement for chlor-alkali facilities to prepare and implement asbestos management plans, as well as labelling requirements for any asbestos imported for use in diaphragms at chlor-alkali facilities during the phase-out period.

The Regulations include permit provisions for unforeseen circumstances where asbestos, or products containing asbestos, is required to protect the environment or human health and where there is no technically feasible alternative. Any permit issued is valid for one year and the permit holder is subject to reporting requirements. Furthermore, an asbestos management plan must be prepared and implemented by permit holders and by any person carrying out an excluded activity (such as the import and use of asbestos in the production of chlor-alkali, in museum displays, and in laboratories).

PERMIT AVAILABLE WHERE ASBESTOS IS REQUIRED TO PROTECT HEALTH OR ENVIRONMENT.

Starting January 1, 2023, permit provisions in the Regulations will apply to the import and use of replacement parts containing asbestos to service equipment in a nuclear facility and military equipment where no technically or economically feasible asbestos-free alternative is available. Permits issued will be valid for three years and the permit holder will be subject to reporting requirements.

Amendments to the Export Control List

Related amendments to the *Export of Substances on the Export Control List Regulations* (ESECLR) have been made, which prohibit the export of all forms of asbestos, subject to the following exceptions:

- asbestos that is, or is contained in, a hazardous waste or hazardous recyclable material regulated by the *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations*;
- asbestos contained in a product that is a personal or household effect intended for personal use;
- asbestos contained in military equipment;
- asbestos, whether or not it is contained in a product, exported for the purpose of disposal;
- asbestos contained in a product that was used prior to the coming into force of the amendments;

- asbestos contained in a product exported to service military equipment during a foreign military operation, when no technically or economically feasible asbestos-free alternative is available;
- asbestos contained in a product in amounts that are not greater than trace amounts;
- asbestos contained in a raw material extracted from the ground and exported to manufacture a consumer product that contains asbestos in amounts that are not greater than trace amounts;
- asbestos contained in a raw material extracted from the ground and exported to manufacture a product that is not a consumer product;
- asbestos contained in a raw material extracted from the ground and exported for a purpose other than manufacturing a product, if the raw material will not be sold as a consumer product;
- asbestos, whether or not it is contained in a product, for use in a laboratory (for analysis, scientific research or as a laboratory analytical standard); and
- asbestos, whether or not it is contained in a product, for display in a museum.

All exports of substances listed in the Export Control List (which includes all forms of asbestos) require a prior notification of export. To meet international obligations under the *Rotterdam Convention*, exports allowed by the above exemptions may require a permit and be subject to requirements respecting labelling, record keeping, and inclusion of safety data sheets with the exports.

Tracking Outcomes

ECCC has defined quantitative performance indicators as part of the implementation strategy for the Regulations and the ESECLR. ECCC will track the outcome for each quantitative performance indicator through reporting requirements and enforcement activities. The performance of the Regulations and ESECLR will be assessed annually to allow ECCC to evaluate the progress towards program objectives.

Environmental Law

Aidan Cameron, Lindsay Burgess and Meghan Bridges

CANADA (CANADIAN ENVIRONMENTAL ASSESSMENT AGENCY) V. TASEKO MINES LIMITED, 2018 BCSC 1034

In this case, the B.C. Supreme Court dismissed Canada's petition requesting a statutory injunction to prevent Taseko Mines from carrying out exploration work authorized in a permit Taseko obtained from the B.C. government. The Court also heard Taseko's petition for a declaration that the *Canadian Environmental Assessment Act, 2012* does not apply to its provincially authorized activities.

Canada argued the work authorized by the provincial permit was connected to another project under Taseko's management, which the federal government had not approved on the basis that it would have deleterious environmental effects (Taseko was pursuing an appeal of this decision at the time the issues in this case arose). Under s. 6 of the *CEAA, 2012*, undertaking activities connected to an unapproved project constitutes a federal offence.

A key dispute between the parties was the scope of the federally unapproved Taseko project, which had been described in a letter from the Canadian Environmental Assessment Agency to Taseko as entailing "constructing, operating and closing an open pit mine." The Court held that the word "constructing" should not be construed so broadly as to contain all the series of approvals required prior to actually building the key components of the mine. Thus, the exploration activities authorized by the B.C. government approval did not have a sufficient nexus to fall within the definition of "constructing" the federally unapproved project.

The Court also considered whether the activities in the approved provincial permit were "incidental to" the rejected federal project pursuant to the definition of "designated project" in s. 2(1) of the *CEAA, 2012*. It held that the word "incidental" required a certain level of proximity as well as a possibly causal connection between the activities and the designated project. In this case, the Court concluded that such a level of proximity or causal connection did not exist between the work permit approved by B.C. and the project rejected by the federal government.

With respect to the declaratory relief sought by Taseko, the Court held that its determination with respect to the injunction had settled the issues in dispute and Taseko's declaration petition was moot.

EAGLERIDGE INTERNATIONAL LIMITED V. NEWFOUNDLAND AND LABRADOR (ENVIRONMENT AND CONSERVATION), 2018 NLSC 180

This case involved a judicial review of issues arising from a proposal by Eagleridge International Limited to construct a gravel road for mineral exploration on land in Newfoundland and Labrador on which it held mining licenses.

In 2013, the Minister of Environment and Conservation granted approval for the project, but required Eagleridge to deliver an Environmental Preview Report. In 2014, a different Minister released Eagleridge from the obligation to provide the report. A group of concerned citizens appealed both the approval and the release, but their appeal did not reach the Minister's office within the statutory time limit and the Minister did not issue any decision on the appeal. In late 2015, a new government took office, and in 2016 the new Minister advised Eagleridge that the government intended to revive the concerned citizens' appeal. Eagleridge challenged the legal status of the revived appeal in writing, but received no response. The Minister then withdrew the release from providing an Environmental Preview Report.

On judicial review, the Court quashed the decisions to revive the appeal and to reverse the release of Eagleridge from delivering an additional environmental report. The Court found that the decision to release Eagleridge from the obligation to deliver a report was properly made, and rejected the distinction Newfoundland tried to draw between the Minister's decision to grant the release and the Cabinet's authorization of the Minister to do so. Having declined to reject the project proposal, it was open to the Cabinet to authorize the Minister to take a course of action, which in this case was granting the release. The Minister's decision to release the project was also reasonable — there were conflicting economic and environmental issues, and the Minister exercised his discretion after consideration of both sides and discussion in Cabinet.

The Court also considered the appeal launched by the group of interested citizens. The Court accepted that the concerned citizens' appeal was filed within time because all parties were aware of the existence of the appeal within the statutory time limit, even if the appeal was not technically properly

filed on time. However, the Court found that the Minister's failure to make a decision on the appeal within 30 days necessarily led to a lapse of the appeal due to the mandatory language of the province's *Environmental Protection Act*. The appeal was not capable of being "revived" at a later date because there was nothing to be revived.

Relatedly, the Court held that it was not reasonable for the Minister to "revive" the appeal. The Minister breached rules of natural justice by failing to give reasons for his revival of the appeal. Finally, the Court held that Eagleridge proved all elements of public interest estoppel; therefore, if the government determined in the future (by lawful means) that the release should be reversed or altered in any way, Eagleridge would be entitled to claim its reasonable costs associated with actions taken pursuant to the release.

The *Impact Assessment Act*: A New Narrative for Canadian Environmental Policy?

Paul Cassidy and Leah Whitworth

The politically charged nature of environmental assessments in Canada is no secret. Built on a foundation of dual federal and provincial jurisdiction, Canada's regime of environmental regulation is composed of a plethora of overlapping and often conflicting environmental laws. The direction of our environmental policy swings like a pendulum, often dictated by election-day appetites for climate change or economic advancement. The Canadian resource sector is the principal casualty of these tendencies, as each shift backpedals any incremental progression since the last.

It is against this backdrop that the Trudeau Government introduced the *Impact Assessment Act* (IAA) to Parliament. Included in Bill C-69, which is currently undergoing Senate approval, the IAA is set to replace the current *Canadian Environmental Assessment Act* (CEAA 2012) and provide a new framework for federal environmental assessment of certain projects.

Advocacy from the Mining Sector

Given that mining projects constitute 60% of all federal environmental assessments, the Canadian mining industry has an interest in the fate of Bill C-69 and has taken an active role in its progress through the legislature. The first reading of Bill C-69 occurred on February 8, 2018, and the Parliamentary Committee on Environment and Sustainable Development (Committee) reported Bill C-69 with amendments on May 29, 2018. The third reading occurred on June 6, 2018 and Senate approval is currently underway.

Following the first reading, the Committee requested stakeholder submissions on the draft IAA. Additional stakeholder comment was sought by the Canadian Environmental Assessment Agency (Agency) on proposed "Project List" regulations, which designate whether a project will be subject to a federal environmental assessment.

The Mining Association of Canada (MAC) responded with submissions on both the draft IAA and on the proposed Project List regulations. In contrast to the submissions of many other stakeholders, MAC recognized the ability of the IAA, if implemented properly, to improve the current federal environmental assessment framework.

Submissions on the Draft IAA

MAC made two specific amendment requests in their submissions at the committee stage:

(a) **Transition**. MAC proposed to amend Bill C-69 to permit environmental assessments currently proceeding under CEAA 2012 to continue, rather than transfer the assessments to the IAA. MAC argued that transitioning projects proceeding under CEAA 2012 to the IAA would create uncertainty for project proponents, investors and communities. MAC underscored the importance of this proposed amendment by highlighting the decline of appeal associated with Canada's investment market in recent years.

(b) **Agency assessment of all mines and mills**. As uranium mines and mills are subject to regulation by the Canadian Nuclear Safety Community (CNSC), MAC proposed amending the IAA to permit continued co-operation with CNSC and the Agency regarding the regulation of uranium mines and mills.

MAC also offered comments on other key provisions of the IAA. In particular, it praised the IAA's inclusion of co-operative federalism, including the expanded opportunities for substitution and delegation. MAC's praise contrasted with the views of many other stakeholders who criticized this approach. Most criticism stemmed from perceived encroachment on the jurisdiction of natural resource activities, a matter solely within provincial jurisdiction pursuant to s. 92A(1) of the *Constitution*

Act, 1982. Support for this position is found in leading jurisprudence on the split between provincial and federal jurisdiction to conduct environmental assessments. In *Oldman River Society*, the Supreme Court of Canada made clear that federal environmental assessments are "auxiliary" and should only affect matters that are "truly in relation to an institution or activity that is otherwise within [federal] legislative jurisdiction."[1]

MAC's submissions also echoed concerns raised by other stakeholders about the predictability of environmental assessment processes and the potential for the IAA, if not properly implemented, to exacerbate these issues. MAC, however, proposed a pragmatic solution. MAC advocated for governments to use s. 114(1)(c) of the IAA, which provides the Minister of Environment and Climate Change authority to enter into agreements or arrangements with, *inter alia*, provincial governments and Indigenous government bodies. MAC suggested that the use of these agreements would, in effect, strengthen the transparency of the delegation and substitution processes, while also providing prospective project proponents with clarity on what assessment process would apply in a proposed project location.

Submissions on the Proposed Project List Regulations

MAC's submissions to the Agency regarding the project list regulations called for more clarity around jurisdictional boundaries, and a "consistent application of federal assessment based on a clear rationale."[2] While less rosy than its submissions to the Committee about the draft IAA, MAC's submissions on the project list dovetailed with the larger picture of MAC's advocacy efforts. Substitution, co-operative assessments, joint review panels, delegation and other endeavors of co-operative federalism are impossible where roles remain undefined, efforts are duplicated and inconsistent practices persist.

Specifically, MAC argued the approach to an environmental assessment of a project in "sole federal jurisdiction" (Federal Project), such as projects on federal lands, should be materially different than the approach taken regarding a project that is in "sole provincial jurisdiction" (Provincial Project) or a project that is federally regulated but still subject to provincial regulation (Shared Project).

MAC proposed that the environmental assessment of a Shared Project or Provincial Project should only be assessed for potential effects in areas of federal jurisdiction related to the environment (such as impacts on fish, migratory birds, etc.). In contrast, Federal Projects should be assessed for all environmental impacts (such as air pollution, waste disposal, etc.) under the IAA against a broader set of environmental effects and at a lower threshold, without constraint from the provincial regulatory frameworks. This approach aligns with *Oldman River Society*.

1. *Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3.
2. MAC's submissions on the project list, p. 1.

In relation to the mining industry, MAC opined that if the presence of provincial regulatory requirements is considered sufficient grounds to forego federal assessment, then all mining sector projects should be removed from the project list. Alternatively, MAC advocated that if the project list is to be based on environmental effects criteria applied consistently across all sectors, then underground mines should be excluded from the project list and a material production threshold on inclusion of open pit mines and metal mills should be imposed.

Conclusion

MAC's advocacy efforts with respect to the IAA were fruitful. Since MAC's submissions at the committee stage, the IAA has been amended to reflect its proposed transition language and to permit the project list to determine whether co-operation between the CNSC and the Agency will occur in respect of uranium mines and minerals.

However, whether the IAA will be implemented in a way that addresses MAC's overarching concerns is yet to be seen. It is only possible to understand the impact on process predictability and other practical implications once projects proceed under the new assessment framework. It is also plausible that the IAA will impact the various Canadian resource sectors to a different degree, bringing prosperity to some while hindering others.

If nothing else, the IAA will shift the past narrative of Canadian environmental policy. If jurisdictional boundaries are clarified, the IAA's inclusion of co-operation and transparency into the existing structure of federalism and democracy may have the effect of adding further predictability to the environmental assessment process. In turn, the current chill on resource sector investment may be reduced. As highlighted by MAC, however, any potential success is entirely contingent on proper implementation and sufficient government funding.

Case Law Summaries

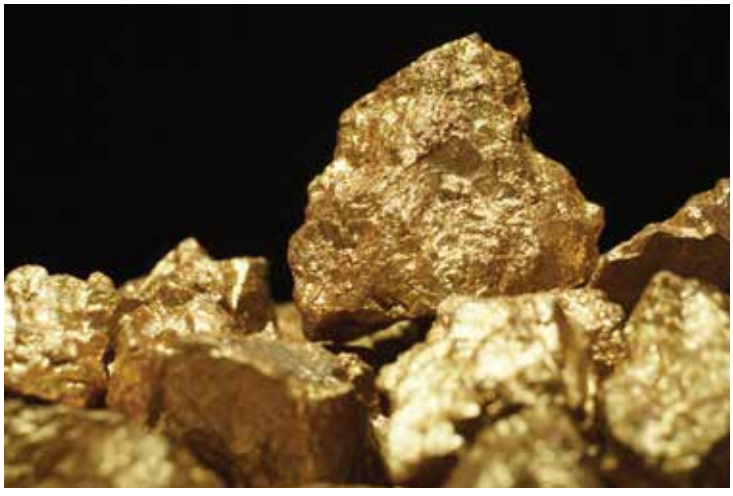
Expropriation

Aidan Cameron and Meghan Bridges

OAKLEY V. DDV GOLD LIMITED, 2018 NSUARB 37

This decision of the Nova Scotia Utility and Review Board is the first to consider the *Expropriation Act* in the context of a residential property and structure as opposed to commercially owned lands. It involved DDV Gold Limited's expropriation of Mr. Oakley's lands near Halifax, on which Mr. Oakley's home was situated, for use in a gold mine project.

DDV Gold and Mr. Oakley had a draft agreement for DDV Gold to purchase Mr. Oakley's lands in 2008, but it was never finalized. For several years, Mr. Oakley was left in limbo and did not live in his home on the understanding that DDV Gold would be purchasing it. DDV Gold eventually made an offer to purchase the land which Mr. Oakley declined. DDV Gold then applied to expropriate Mr. Oakley's land. The parties agreed on the market value of the land, but disagreed on what, if any, compensation should be awarded to Mr. Oakley for disturbance arising from the expropriation.



The Board held that mining companies authorized by the *Expropriation Act* are liable for all relevant compensation contemplated by the Act, and nothing in the Act supports an interpretation that mining companies should be treated differently from the Crown. Compensation for an owner's disturbance was not limited to pecuniary losses and did not require an independent actionable wrong to be awarded. In this case, Mr. Oakley was entitled to compensation because he had incurred expenses with the expectation of reaching a deal with DDV Gold. Taking into account Mr. Oakley's hardship, which was magnified by the fact that he only had one hand, the Board set compensation at the statutory maximum of 15% of the market value of his lands.

Labour and Employment

Aidan Cameron, Meghan Bridges, Alexis Hudon, Camille Marceau and Angela Juba

MINES OPINACA LTÉE C. COMMISSION DES NORMES, DE L'ÉQUITÉ, DE LA SANTÉ ET DE LA SÉCURITÉ DU TRAVAIL DES NORMES, 2018 QCCS 4899

This decision was an appeal from a conviction under Québec's occupational health and safety regime. The appellant, Mines Opinaca ltée, operates a gold mine in Northern Québec. During the construction of the mine, the appellant installed fire doors in two underground mechanical workshops. During an inspection, an occupational health and safety inspector issued a correction notice requiring the appellant to install an automatic closing device on the fire doors within a specified timeframe.

Mines Opinaca complied with the requirement and installed an automatic closing system, but failed to comply with the time limit. In 2017, Mines Opinaca was convicted of violating provisions of the *Act Respecting Occupational Health and Safety* and the *Regulation respecting occupational health and safety in mines*.

Mines Opinaca contested the conviction because it was unreasonable on the evidence, arguing that the convicting judge erred in law. Mines Opinaca argued that it was impossible to install the automatic closing device within the required time frame, since the steel fire door onto which the device was to be installed was defective. The underlying defect had to be corrected before the automatic closing device could be installed.

The Québec Superior Court agreed. The Court reversed the conviction on the basis that the evidence showed that it was impossible for the appellant to comply with the timeframe in the correction notice. The Court held that the trial judge erred in dismissing the defence of impossibility, allowed the appeal and acquitted the appellant of the offence charged.

MOUNT POLLEY MINING CORPORATION V. UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 1-2017., 2018 CANLII 64302

This case involved allegations by a union that Mount Polley Mining Corporation breached s. 54 of the B.C. *Labour Relations Code* (Code) when it failed to give 60 days' notice before laying off a significant number of employees in early 2018.

Mount Polley argued that it should be relieved of its obligation under s. 54 because the layoff resulted from circumstances outside of its control, or alternatively because the requirements of s. 54 would only result in increased layoff notice to individual employees who were already appropriately compensated in accordance with the collective agreement. The Labour Relations Board, however, held that Mount Polley had breached s. 54 of the *Code*, and ordered Mount Polley to make whole any employee who lost wages as a result of the failure to comply with the notice requirements.

The Board also refused to exercise its discretion to relieve Mount Polley of the notice requirements under s. 54. Mount Polley had argued that the layoffs were caused by financial losses resulting from the tailings pond breach in 2014 and its parent company's decision to stop running the mine at a loss. The only plan that could avoid further losses, according to Mount Polley, would require a reduction of pit operations, necessitating the lay-offs. The Board was not persuaded that the tailings pond breach, the cost of remediating the breach, and the significant financial losses thereafter were "new and unforeseen," such that Mount Polley would have been unable to comply with the notice requirement in s. 54 of the *Code*.

RED CHRIS DEVELOPMENT CO. AND USW LOCAL 1-1937, RE, BC LRB NO. B25/2018

In this decision, the B.C. Labour Relations Board granted a union's application for access to Red Chris Development Company's mining operation for the purpose of organizing employees.

Red Chris resisted the union's application on the basis that it had already provided the union with access pursuant to the terms of a separate settlement agreement, and granting access to the same group of employees a second time would be inappropriate. The Board disagreed, holding that it was not obligated to defer to an access period agreed to between the parties in a settlement agreement. The Board was concerned that mandatory deferral to a private agreement between the parties would result in a disincentive to parties to negotiate and agree to terms of access privately, particularly on the side of the union, which would be disinclined to agree informally to a period of access if such agreement would prevent it

from seeking more time. In this case, the union was seeking a limited period of further access (two five-day periods), not open-ended access. The Board concluded this request was reasonable and granted the extension.

The Board also granted the union's application to turn off certain security cameras on mine premises during the additional period of access. The Board was not satisfied that Red Chris used its security cameras to identify participating employees or otherwise monitor the union's organizing campaign, but it recognized the potential to do so and the chilling effect that would have on employees. Leave to reconsider this decision was denied. See BC LRB No. B42/2018.

TECK COAL LTD. AND USW, LOCAL 7884, RE, 2018 CANLII 2386 (BC LA)

This arbitration concerned grievances filed by two unions at different sites operated by Teck Coal Ltd. following the unilateral introduction by Teck of a policy permitting random drug and alcohol testing of employees.

The main issue before the arbitrator was whether the random drug and alcohol testing was "reasonable" and therefore a proper exercise of management rights. The arbitrator concluded the testing intruded on employees' privacy in an invasive manner and so was not reasonable.

The parties did not dispute that the employees' privacy was infringed by the random testing policy. Teck argued that there was a legitimate need for random testing in order to counter a "work hard, play hard" culture involving excessive consumption of alcohol and drugs on days off. The arbitrator disagreed that this was a real motivation for the introduction of the policy, concluding the policy was meant to address an element of *risk* that Teck believed could impinge on safety rather than a demonstrable workplace problem. In the absence of a demonstrable workplace problem, there was no cause or legitimate need for random testing.

The arbitrator also considered whether, even if Teck had established a legitimate need for random testing, random testing would be an effective means of addressing Teck's concerns or whether a less intrusive response was available. The arbitrator concluded that random drug testing was not a proportionate measure in light of evidence that the accident rate was already declining as a result of other safety measures introduced by Teck.

UNIFOR, LOCAL 707A V. SUNCOR ENERGY INC., 2018 ABCA 75

In this case, Suncor Energy Inc. appealed an interim injunction prohibiting it from implementing random drug and alcohol testing of Unifor's members working on an oil sands facility near Fort McMurray, Alberta until completion of an arbitral hearing on whether the random testing policy was justified.

An Alberta chambers judge granted the injunction on the basis that: (i) there were serious issues to be tried, including whether random testing is effective in deterring drug and alcohol use in the workplace and whether drug and alcohol use on the Suncor site was increasing or decreasing over time; (ii) the impact on the privacy and dignity of workers could not be remedied if the union were ultimately successful on the arbitration; and (iii) the balance of convenience favoured granting the injunction because chaos would ensue if the injunction was not granted.

A majority of the Alberta Court of Appeal upheld the chambers judge's decision. The majority swiftly rejected Suncor's arguments that the chambers judge failed to consider the evidence and erred in considering the impact on the privacy and dignity rights of employees to be irreparable harm. On the balance of convenience, the majority agreed with the chambers judge that the balance of convenience favoured Unifor's position in favour of the injunction prior to the ultimate determination of the issue by the arbitration panel. Thus, there was no reviewable error in the chamber judge's exercise of discretion to grant the injunction and the appeal was dismissed.

WEST FRASER MILLS LTD. V. BRITISH COLUMBIA (WORKERS' COMPENSATION APPEAL TRIBUNAL), 2018 SCC 22

In this decision, a majority of the Supreme Court of Canada upheld a workers' compensation claim and associated fine against a forestry company that owned the property where an independent contractor's employee was fatally injured.

The employee was a tree faller who was struck by a rotting tree within the area of a forest license held by West Fraser Mills. West Fraser Mills employed a supervisor to oversee contractors prior to the project starting. The supervisor met with the independent contractor and the tree faller before work began and completed a walk-through of one work area, but the supervisor did not walk through or identify hazards in a second area where the fatality occurred.

The B.C. Workers' Compensation Board (Board) investigated the accident

and found that West Fraser Mills had failed to meet its obligations as the "owner of a forestry operation" to ensure all activities were planned and conducted safely, and specifically to take all reasonable steps to identify hazardous or potentially hazardous work conditions. The Board fined West Fraser Mills C$75,000 under the *Workers Compensation Act*. The Workers' Compensation Appeal Tribunal dismissed West Fraser Mills' appeal, and the B.C. courts upheld the Tribunal's order.

On appeal to the Supreme Court of Canada, West Fraser Mills argued that the Board did not have jurisdiction to issue a fine under s. 196(1) of the *Workers Compensation Act* because that section only permitted fines against entities acting as an "employer," whereas it was an "owner." The majority of the Court disagreed and upheld the Appeal Tribunal's finding that West Fraser Mills was an "employer" within the meaning of the *Workers Compensation Act*. There was a factual nexus between West Fraser Mills' activities and choices as an employer of individuals meant to monitor the worksite (i.e., the supervisor) and the incident that occurred. The Appeal Tribunal had accepted this interpretation of "employer" in issuing the fine against West Fraser Mills, and the Court held that this approach was reasonable and entitled to deference on appeal. The Court also noted that this interpretation of the word "employer" recognized the complexity of overlapping and interacting roles on the actual worksite and furthered the goals of the statute and the scheme built upon it.

For more on this decision, see McCarthy Tétrault LLP's *Canadian Employer Advisor* blog post entitled "Supreme Court of Canada Upholds Workers' Compensation Order Against Site Owner."

Québec's Administrative Labour Tribunal Confirms the Safe Character of a Mining Practice and Reiterates the Limited Powers of Occupational Health and Safety Inspectors

Jacques Rousse and Caroline-Ariane Bernier

On June 22, 2018, Québec's Administrative Labour Tribunal (Tribunal) released its decision in *Mines Agnico Eagle ltée et Syndicat des métallos (local 4796)*,[1] confirming the safe character of a mining practice called *mucking under loaded holes or holes being loaded* (Mucking Procedure), and reiterated that the powers of the *Commission des normes, de l'équité, de la santé et de la sécurité du travail* (CNESST) and its inspectors are limited.

Context

In October and November 2016, CNESST inspectors visited 15 underground mines in Québec in order to completely prohibit the Mucking Procedure consisting of remotely mucking ore with scooptrams under drill holes loaded with explosives or being loaded therewith. They ordered an

1. 2018 QCTAT 3096. McCarthy Tétrault LLP acted as counsel for Glencore Canada Corporation (Matagami and Raglan).

immediate ban of the practice on the basis of s. 186 of an *Act respecting occupational health and safety* (AOHS) whereby a CNESST inspector may order the suspension of work or the complete shutdown of a workplace if such inspector considers that workers' health, safety or physical well-being are endangered.

Under s. 186 of the AOHS, the inspector must substantiate his or her decision in writing and indicate the steps required to eliminate the danger. In this case, all 15 inspectors' reports were almost identical, cited the same risks[2] and prohibited the use of the Mucking Procedure. Under the AOHS, a party (employers, employees or unions) who believes to have been wronged by a CNESST inspector's decision may apply for a review of the decision in front of the administrative review branch of the CNESST and, if still unsatisfied with the result, may contest it in front of the Tribunal. Proceedings brought as a consequence of a work stoppage under s. 186 AOHS are to be heard and decided by preference.

The companies operating the 15 underground mines[3] contested the decision in front of the CNESST and, subsequently, in front of the Tribunal since they all believed that the Mucking Procedure was safe and did not constitute a danger for workers' health and safety. It should also be noted that the CNESST inspector's decisions had a serious financial impact on the productivity of some underground mines in Québec all the while, ironically, in fact increasing the risk of injuries to workers according to numerous experts and engineers. Two local unions represented a total of seven mines and sided with the CNESST, alleging that the Mucking Procedure was dangerous.

The Tribunal joined all 15 files together and the hearing lasted for 53 days between February 2017 and March 2018. In addition, the CNESST and the Métallos union sought judicial review in front of the Superior Court on two interlocutory issues, without success.

On the merits, the CNESST and the unions argued that the Mucking Procedure represented a risk for the workers' health and safety on the basis of the following scenarios:

(1) The collapse of the bottom part of the excavation may lead to a fall of rocks onto explosives laying on the ground which may lead to their detonation and potentially the detonation of the loaded holes above (and, therefore, the detonation of the entire stope);

2. The inspectors never once mentioned the words "danger" or "probability" in their reports. Instead, they discussed "risks" and "possibilities."

3. Mines Agnico Eagle Ltée (Goldex, Lapa and Laronde), Glencore Canada Corporation (Matagami and Raglan), Mines Richmond Inc. (Beaufor), IamGold Corporation (Westwood), Integra Gold Corp., Metanor Resources inc. (Lac Bachelor), Stornoway Diamonds (Canada) Inc. (Lagopède), Niobec Inc. (Niobec), Goldcorp (Éléonore), Breakwater Ressources Ltd. (Nyrstar/Langlois), Canadian Royalties (Nunavik Nickel), K+S Windsor Ltée (Seleine).

(2) A scooptram on fire under drill holes loaded or being loaded with explosives may lead to the detonation of explosives falling in the fire or of the loaded holes above the scooptram (and, therefore, the detonation of the entire stope);

(3) Explosives may fall down a drill hole and the impact on the ground may lead to their detonation and the detonation of the holes above, or once on the ground, may be crushed by a scooptram and detonate. This may also lead to the detonation of the entire stope.

The CNESST and the unions argued that should the Mucking Procedure not constitute a danger, it is nonetheless prohibited by law, more specifically by certain provisions of the *Regulation respecting occupational health and safety in mines* (Regulation) having to do with circulation of vehicles in loading areas and, as such, it should not be practiced.

The employers' position was that the Mucking Procedure did not constitute a danger — not only is it safe, but, in some circumstances, it is even the safest method of extracting ore and prohibiting it may put the workers' health and safety at risk. The employers relied on scientific data to demonstrate that the CNESST's inspectors scenarios were unsupported theories based on a blatant misunderstanding of the Mucking Procedure, the characteristics of modern explosives and the heat transfer abilities of the rock. The employers also put into evidence the fact that the Mucking Procedure existed elsewhere in Canada (Ontario and British Columbia) and that it had been used in Québec for over 20 years. Furthermore, the employers argued that there were no accidents documented in Québec or the rest of the country regarding the Mucking Procedure. Finally, the employers contended that the Mucking Procedure was not prohibited by law.

MUCKING NOT A DANGER TO HEALTH AND SAFETY.

The employers presented six expert witnesses, many of which are internationally renowned in the respective fields, to speak about the mechanics of the Mucking Procedure and the safety measures adopted to protect the workers' health, the highly safe character of modern explosives, the scientific improbability that the risks raised by the CNESST inspectors will materialize and the characteristics of rock mass. In response, the CNESST and the unions brought no expert witnesses and no scientific documents or data and, instead, relied on the testimonies of five of their CNESST inspectors (only one of which was a fully certified mining engineer at the time) and several active and retired minors and CNESST inspectors. They also presented extensive documentation regarding old events to attempt to explain why the Mucking Procedure constitutes a danger.

Decision

In the end, the Tribunal found in favour of the employers: it declared that

the Mucking Procedure did not constitute a danger to the health and safety of workers and that it was not prohibited by the Regulation. The Tribunal went so far as to confirm that, in light of the expert evidence presented, the Mucking Procedure is a safe practice.

The Tribunal reiterated that a CNESST inspector may only prohibit a practice or procedure as per s. 186 of the AOHS if there is a "danger" for the health or safety of workers. Should there not be any "danger," CNESST inspectors do not have the power to suspend or prohibit the work. The Tribunal explained the difference between a "danger" and a "risk:" although a danger must not be imminent, it must at least constitute a *probability*, while the risk, on the other hand, is only a *possibility*. The danger, therefore, must present a probability of realization which is not negligible, and that probability is not to be calculated mathematically. The danger cannot be a simple fear or apprehension and must be analyzed in a factual context. While admitting that the inexistence of past accidents is not an argument to take into account when determining the proper safety precautions to adopt with regards to working procedures, the Tribunal explained that such inexistence can nonetheless constitute an indication that the risks of materialization of the apprehended event are not very high when appreciating the existence or not of a danger.

A "DANGER" IS A *PROBABILITY*; A "RISK" IS A *POSSIBILITY*.

When analyzing the existence or not of a danger (as opposed to a risk), two elements must therefore be examined: (i) the probabilities of materialization of the risk, and (ii) the gravity of the consequences attached thereto.

The Tribunal also confirmed that inspectors and employers should not pursue a situation of "Zero Risk" since the absence of any risk is in a workplace is impossible to achieve — what the inspectors and employers should strive for is the elimination of *dangers*.

In the end, the Tribunal rendered a decision of over 200 pages in which it gave a very exhaustive review of the expert evidence presented and harshly criticized the lack of professionalism of the CNESST inspectors and the tools they used to come to the conclusion that the Mucking Procedure was dangerous. It re-established the status quo which existed prior to the CNESST's fall 2016 work stoppages and reiterated that the CNESST inspectors' powers are not unlimited: should an inspector believe that a practice or procedure constitute a danger for the health or safety of workers, he or she better do his or her homework and not simply act on unjustified fears or misguided apprehensions.

Case Law Summaries

Municipal Law

Aidan Cameron, Vivian Ntiri, Alexis Hudon, Camille Marceau, Angela Juba and Jack Ruttle

COBALT (TOWN) V. COMENA (TOWNSHIP), 2018 ONSC 3713

In this decision, the Ontario Superior Court of Justice held that the use of a property for the extraction of aggregates was not permitted under the applicable zoning bylaw.

The case involved a parcel of land in the Coleman Township — known as the "Cobalt pit property" —that was owned by the Town of Cobalt. Cobalt sought a declaration that its use of the property for aggregate extraction was permitted. The applicable zoning bylaw in Coleman Township zoned a portion of the property as "residential" and another as "development." The residential zone did not permit pits or quarries, while the development zone permitted existing non-residential uses.

In declining to grant the declaration, the Court found that Cobalt did not carry on any extraction activities in the development zone and thus such activity was not an existing non-residential use. As for the residential zone, the Court considered whether historical aggregate extraction in that area amounted to a legal non-conforming use of the property, and concluded that it did not, primarily because the extraction had increased significantly in scale since 2013 and differed in kind from the historical extraction that had been conducted on the land. As a result, the Court determined that the large-scale commercial extraction that Cobalt wished to continue was not a permitted use of its property.

GASTEM INC. C. MUNICIPALITÉ DE RISTIGOUCHE-PARTIE-SUD-EST, 2018 QCCS 779

In 2011, Gastem Inc. undertook a petroleum exploration project within the Municipality of Ristigouche-Partie-Sud-Est (Municipality) and proceeded with the development of a drilling platform on private land. In March 2013, at the request of residents, the Municipality enacted a bylaw designed

to protect water sources by prohibiting drill sites within a two-kilometre radius around any artesian or surface well. The bylaw also banned the introduction of any chemical substance into the soil likely to affect water quality.

Gastem's exploration activities contravened the new bylaw. Gastem commenced litigation, alleging that the Municipality adopted the bylaw in an illegal, targeted and untimely manner in order to prevent Gastem from continuing its activities. Gastem sought approximately C$2M in damages. The Municipality sought to have the action dismissed on the basis that it amounted to an abuse of process.

Superior Court Justice Nicole Tremblay dismissed Gastem's claims on the basis that the Municipality has a duty to protect its waterways in accordance with provincial government regulations and applicable laws. The Court held that Gastem failed to demonstrate that the bylaw was enacted in bad faith. Further, the balance of convenience clearly favoured Municipal interests in the circumstances. The Court also ordered Gastem to pay costs in the amount of 50% of the Municipality's legal fees, and an additional C$10,000 to cover public relations expenses incurred by the Municipality.

Securities

Aidan Cameron and Lindsay Burgess

ANGLO PACIFIC GROUP PLC, RE, 41 O.S.C.B. 6159 (OSC)

In this decision, the Ontario Securities Commission granted Anglo Pacific Group plc an exemption from the reporting requirements in s. 2.2 of National Instrument 43-101 — *Standards of Disclosure for Mineral Projects*, on conditions. The exemption enabled Anglo Pacific to disclose to its Canadian investors public disclosures made in foreign jurisdictions in respect of certain material properties underlying its royalty portfolio and options.

Anglo Pacific's business consists of, among other things, passive royalty interests in mining projects and operations (Royalty Portfolio), and options to acquire royalties and other associated assets (Royalty Options). Anglo Pacific considered the Royalty Portfolio and Royalty Options to be material to its business, and considered several mines as mineral projects on properties material to it. However, as a royalty and/or option holder, Anglo Pacific had limited (or no) access to non-public scientific and technical information for the properties underlying the Royalty Portfolio and Royalty Options.

Anglo Pacific wanted to provide public disclosure made in foreign jurisdictions in respect of the properties underlying its Royalty Portfolio and Royalty Options to its Canadian investors. However, such disclosure might not comply with NI 43-101, and in particular s. 2.2, which requires disclosure of mineral resource or mineral reserve information under CIM standards. Although s. 7.1 provided an exemption similar to the one sought, Anglo Pacific was unable to utilize that exemption because: (i) it was also exempt from filing technical reports under a different section of NI 43-101; and (ii) it had limited access to the information needed to convert the foreign code reporting to CIM standards.

The Commission granted the exemption sought subject to the following conditions: (i) the exemption only applied to the Royalty Portfolio and Royalty Options whose owners/operations were subject to Foreign Code Disclosure; (ii) the information used by Anglo Pacific is public; (iii) the disclosure contains a cautionary statement; and (iv) the decision terminates in 60 months.

Surface Rights and Access to Minerals

Aidan Cameron, Vivian Ntiri and Jack Ruttle

H. COYNE & SONS LTD. V. WHITEHORSE (CITY), 2018 YKCA 11

In this decision, the Yukon Court of Appeal considered the applicability of Yukon mining legislation, and the ability of the City of Whitehorse to regulate or prohibit the mining of subsurface minerals under its planning, land use and development powers.

This case is an appeal from a decision discussed in *Mining in the Courts,* Vol. VIII. H. Coyne & Sons owned a subsurface mineral interest in two subsurface parcels in Whitehorse. Part of the surface area, Lot 1280, was transferred to a development company. Pursuant to the City's 2010 official community plan, 2012 zoning bylaw, and a subdivision application approval, the development company was permitted to construct a rural residential development on the lot and subdivide the land. The development company then denied Coyne access to the surface of the lot for exploration and mining activities. Coyne commenced an action in the Yukon Supreme Court seeking declaratory relief that would give Coyne rights of access. The Supreme Court of Yukon declined to grant the declarations. Coyne appealed.

LAND USE BYLAW UPHELD: CANNOT USE SURFACE TO ACCESS SUBSURFACE RIGHTS.

The Court of Appeal upheld the lower court's decision, holding that Whitehorse's land use bylaws validly prohibited Coyne from using the surface to access its subsurface mining rights. Coyne had argued that the Yukon *Municipal Act* (Act) does not include the power to prohibit or regulate the mining of lands. The Court disagreed, finding that a broad and purposive interpretation of the words "use and development of land" in the Act includes the power to regulate or prohibit the mining of lands within Whitehorse (subject to any superior Territorial legislation). The Court also declined to grant declarations respecting Yukon mining legislation, in particular because Coyne had failed to give Yukon notice of its court proceeding in which the court would be required to opine on the meaning and scope of important legislation and regulations in Yukon.

REGISTRAR OF TITLES V. GREAT WEST LIFE ASSURANCE COMPANY AND PRIMROSE DRILLING VENTURES LTD., 2018 SKQB 290

In this case, the Registrar of Titles applied to the Saskatchewan Court of Queen's Bench by way of reference under the province's *Land Titles Act* in order to determine ownership in a dispute over a one-quarter interest in the minerals associated with a piece of land.

One respondent, the Great West Life Assurance Company (GWL), owned a plot of land, including its minerals. GWL later transferred surface title, but expressly reserved its mineral interest. A mistake on the subsequent certificate of title indicated that GWL's mineral interest passed with the surface title. After the transfer of title, the mineral interest was divided into quarters and passed to a number of individuals and corporations. The Registrar, after discovering the mistake, filed a caveat that the mineral interest belonging to GWL was mistakenly transferred, and that any subsequent transfer would be subject to GWL's mineral claim. The other respondent was Primrose Drilling Ventures Ltd., who, after purchasing a one-quarter interest in the minerals, disputed the validity of the caveat and asked to be treated as a *bona fide* purchaser for value.

The Court found that Primrose was not a *bona fide* purchaser, that GWL was wrongly deprived of its title to the minerals because of the Registry's mistake, and that GWL's ownership of the minerals was protected by the caveat. Among other findings, the Court noted that under the *Land Titles Act*, the Registrar may correct any error or omission in the land registry through a caveat, and that a purchaser who knowingly proceeds to acquire title in the face of the caveat at a minimum takes title with the caveat endorsed and risks indefeasibility of the title.

THIRD EYE CAPITAL CORPORATION V. RESSOURCES DIANOR INC./DIANOR RESOURCES INC., 2018 ONCA 253

In this decision, the Ontario Court of Appeal clarified when a royalty interest constitutes an interest in the land.

The case involved Dianor Resources Inc., which had become insolvent. Dianor's main assets were a group of mining claims subject to a "Gross Overriding Royalty" held by 2350614 Ontario Inc. In the course of Dianor's insolvency proceedings, the Court granted the sale of the mining claims to Third Eye Capital Corporation. The Court held that the sale extinguished the royalty because it did not run with the land nor grant the holder of the royalty an interest in the lands over which Dianor held the mineral rights. 2350614 successfully appealed the decision.

The key issue on appeal was whether the royalty constituted an interest in the land under the test set out by the Supreme Court of Canada in *Bank of Montreal v. Dynex Petroleum Ltd.* 2002 SCC 7. The Court considered the *Dynex* test, which states that a royalty interest can be an interest in land if: (i) the language used to describe the interest is sufficiently precise to show that the parties intended the royalty to grant an interest in land, rather than a contractual right to a portion of the oil and gas substances recovered from the land; and (ii) the interest, out of which the royalty is carved, is itself an interest in land.

In finding that the royalty was an interest in land under the *Dynex* test, the Court offered guidance on the application of the test. Among other things, the Court confirmed that an interest in land does not require a right to enter the property to explore and extract minerals.

For more discussion of this decision, see McCarthy Tétrault's *Mining Prospects* blog post entitled "Ontario Court of Appeal clarifies when a royalty interest constitutes an interest in land."

Valuation in Mining Cases: Lessons from the *Re Nord Gold SE* Dissent Proceeding

Shea T. Small, Fraser Bourne, Shane C. D'Souza, Emily MacKinnon and Konstantin Sobolevski

In many Canadian M&A transactions, shareholders are entitled to dissent from a transaction and be paid the fair value of their shares. Most dissent and appraisal cases settle, with the result that there are relatively few court decisions and little judicial guidance on the subject. In this article, we consider a rare dissent case in the mining context.

In *Re Nord Gold SE*,[1] the Ontario Superior Court (Court) decided a valuation case in which a small number of shareholders of Northquest Ltd. (Northquest) dissented from a second step squeeze-out carried out by way of a plan of arrangement following the company's successful takeover by Nord Gold SE (Nordgold). The dissenters unsuccessfully sought a share price that was three times the value ultimately determined by the court. *Re Nord Gold SE* offers important insights into how valuation is to be approached in dissent cases, especially in the mining context where the valuation exercise may be complicated by the valuation of exploration lands unsupported by a "NI 43-101" (*Standards of Disclosure for Mineral Projects*) report or by the lack of data demonstrating economic mineralization.

Facts

Nordgold acquired all of the common shares of Northquest, a junior mining exploration company, by way of a takeover bid and, subsequently, a plan of arrangement approved by the Court in October 2016. The takeover bid —

1. (17 November 2017), Toronto CV-17-1160-00CL (Ont Sup Ct), supplementary reasons 31 January 2018. McCarthy Tétrault LLP represented Nordgold in this matter.

which was accepted by over 97% of shareholders, including all directors and management — and the plan of arrangement provided consideration to Northquest's common shareholders of C$0.26 per common share. Shareholders representing 0.86% of Northquest's common shares dissented from the plan of arrangement.

In the litigation, Nordgold tendered a valuation report from an expert who opined that Northquest's common shares should be valued at C$0.496 per share. The significant increase in value, compared to the C$0.26 per share that was offered in the takeover bid and the plan of arrangement, was primarily due to market-driven factors, including the increase in the price of gold that occurred in the summer of 2016 between the time Nordgold first announced its intention to make a takeover bid in December 2015 and the valuation date, which was the date before the shareholder meeting to approve the plan of arrangement in September 2016.

The principal divide between the litigants was whether Nordgold's valuation appropriately accounted for all of the value that should be ascribed to Northquest's common shares. Nordgold argued that it did because it valued economic mineralization. The dissidents sought value for Northquest's assets that did not demonstrate economic mineralization.

The Court agreed with Nordgold's position.

Takeaways

The key takeaways from *Re Nord Gold SE* are as follows:

1. ***If court proceedings become necessary, the company should file first unless there are good reasons not to do so***. Under most Canadian corporate statutes,[2] the company is obliged to initiate a proceeding within a specified time for the court to determine the fair value of common shares of dissenting shareholders. Otherwise, any dissenting shareholder may bring a proceeding to determine fair value and may be awarded their costs *notwithstanding* the outcome of the litigation. In *Re Nord Gold SE*, Nordgold was in ongoing negotiations with the dissenters that continued beyond the time for Nordgold to commence a valuation proceeding. Without warning, the dissenters commenced litigation. Nordgold immediately commenced a valuation proceeding in which it explained its rationale for not rushing to court. Throughout the

2. With the exception of B.C., P.E.I. and Québec: *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 185; *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 190; *Business Corporations Act*, R.S.A. 2000, c. B-9, s. 191; *The Business Corporations Act,* R.S.S. 1978, c. B-10, s. 184; *The Corporations Act*, C.C.S.M. c. C225, s. 184; *Business Corporations Act*, S.N.B. 1981, c. B-9.1 s. 131; *Companies Act*, R.S.N.S. 1989, c. 81, Third Sched. S. 2; *Corporations Act*, R.S.N.L. 1990, c. C-36, s. 308; *Business Corporations Act*, R.S.Y. 2002, c. 20, s. 193; *Business Corporations Act*, R.S.N.W.T. 1996, c. 19, s. 193; *Business Corporations Act,* S.N.W.T.(Nu.) 1996, c. 19, s. 193.

ensuing proceeding, Nordgold moved first during every litigation milestone. Each party bore its own costs.

2. ***The parties should retain independent and qualified experts to opine on fair value***. In a dissent proceeding, although no party has the onus of proving fair value, the court relies exclusively on the parties' evidence — typically, expert evidence. Selecting the right experts is essential.

   (a) In *Re Nord Gold SE*, the dissenters unsuccessfully challenged the independence of Nordgold's expert who opined on the fair value of the shares — the key issue in the case. Nordgold retained the investment bank that had provided a valuation opinion for Northquest's board with respect to Nordgold's earlier takeover bid. In other words, Nordgold retained the expert who was initially *on the other side* of the transaction, thus providing it with an additional ground to successfully argue that the expert was indeed independent.

   (b) Nordgold successfully challenged the admissibility of the dissenters' opinion on the value of the exploration lands. The dissenters attempted to tender a "group opinion" through the affidavit of one of the dissenters. The court determined that the dissenters had a direct stake in the outcome of the litigation: consequently, they were interested parties, and their opinion was not independent and not admissible.

   (c) The dissenters had also retained an expert in "mineral property valuation," but his opinion was not accepted by the Court. Nordgold successfully argued that the dissenters' expert was not a business valuator and thus, not qualified to opine on the fair value of the shares.

3. ***The valuation opinion must rely on relatively current exploration results***. The expert opining on fair value must rely on recent exploration results.[3] These results may be filed as part of a NI 43-101 report or, if one is not available, on an affidavit from a company employee acting as a "participant expert."[4] The latter approach is more cost-effective and reasonable if there are no material changes to resource estimates since the last NI 43-101 report. This was the case in *Re Nord Gold SE*: recent exploration results had resulted in no material changes. Consequently, Nordgold

3. The Court did not expressly resolve a debate between how "recent" the results should be. As a general principle, neither the parties nor the court may rely on hindsight evidence. Therefore, events that were not known as of the valuation date are generally not relevant, although there are exceptions.

4. A "participant expert" is a person who contemporaneously formed an opinion as part of the ordinary exercise of his or her skill, knowledge, training and expertise while observing or participating in events.

successfully argued that it would make no business sense to produce another NI 43-101 report. Instead, Nordgold filed an affidavit from its exploration manager. The Court accepted this evidence, rejecting the dissenters' argument that Nordgold's exploration manager lacked the independence to opine on the significance of recent drilling results.

4. ***CIMVal is only one of several methodologies that may be used to value common shares***. The dissenters argued that Nordgold's valuation opinion was not reliable because it did not apply CIMVal standards. The Court accepted Nordgold's argument that CIMVal is only one of several tools available to a valuation expert and is not a mandatory valuation methodology in dissent proceedings.

5. ***Non-economic mineralization will likely be excluded without compelling expert evidence***. The dissenters sought a very high share price on the basis that land with no demonstrable economic mineralization should be considered in determining the fair value of the shares. The Court disagreed, applying the standard of "reasonable prospects for eventual economic extraction" to determine whether mineralization should inform fair value.

Case Law Summaries

Tax

Aidan Cameron, Vivian Ntiri, Alexis Hudon, Camille Marceau and Angela Juba

AGENCE DU REVENU DU QUÉBEC C. WESDOME GOLD MINES LTD., 2018 QCCA 518

This case involved an appeal from a Superior Court decision on the interpretation of a provision of Québec's *Taxation Act*.

In October 2002, the Kiena mine ceased operations and was placed in care and maintenance, because its known extractable resources did not economically justify its operations. In 2003, the Respondent Wesdome purchased the Kiena mine. Wesdome invested in the modernisation of the mine's equipment and exploration works in order to use the mine's well to explore some adjacent properties it owned. The investment paid off: through the work undertaken via the Kiena mine, Wesdome identified gold deposits that could justify extraction.

Section 395(c) of the *Taxation Act* provides a tax credit for Canadian exploration expenses, but the tax credit does not apply to development expenses related to a mine that has come into production. The issue was whether Wesdome's investment in the Kiena mine qualified for the s. 395(c) tax credit. The Agence du revenu du Québec (ARQ) reassessed Wesdome in 2011 for exploration credits claimed in 2005 and 2006 relating to the Kiena exploration properties. The ARQ argued that Wesdome did not qualify for the tax credit because the expenditures at the Kiena mine formed part of a continuum of work previously carried out on site, and the mineral resource had reached the production stage. Wesdome argued that the investment did qualify for the tax credit, because the mine was not operational when it made the investment.

EXPLORATION TAX CREDIT CAN APPLY TO EXISTING MINE.

The Court of Appeal upheld the Superior Court's ruling that Wesdome was eligible for the tax credit. The Court of Appeal reasoned that s. 395(c) does not require that the exploration expenses be incurred at a new mine. Further, if a mine was in commercial production sometime in the past, but is not in operation when relevant expenses are incurred, the investment will be eligible. In analyzing s. 395(c), the Court of Appeal concluded that the legislator intended to encourage exploration that could lead to the discovery and production of new mineral resources. Because the Kiena mine was not in production when the investment was made, Wesdome's expenses were eligible for the tax credit. The ARQ has sought leave to appeal to the Supreme Court of Canada.

HUCKLEBERRY MINES LTD V. HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, 2018 BCSC 1481

In this case, a B.C. mining company appealed the amount of resource tax on profits payable on assessment under the *Mineral Tax Act*.

The company, Huckleberry Mines Ltd., operates a copper/molybdenum mine near Houston, B.C. Its investors include three Japanese smelter companies and the Marubeni Corporation. The *Mineral Tax Act* (Act) requires Huckleberry to pay taxes on profits derived from its mine. Determination of this tax requires the calculation of gross revenue, which includes the "transaction value of the mineral product disposed of in the fiscal year of the mine." The transaction value, in turn, is the "price paid or payable for the mineral product." Huckleberry disputed tax assessments issued under the Act, and, after the B.C. Minister of Finance rejected its statutory appeal, Huckleberry appealed to the B.C. Supreme Court.

The central issue was determining the price payable for the copper produced by Huckleberry in 2006. Huckleberry had entered into a sales agreement with its Japanese investors to sell copper at a set price. Later, the parties entered a series of agreements that modified this arrangement. In essence, Huckleberry would sell the copper to Marubeni, which would then sell it to the Japanese companies at the same price as in the original agreement. It was also agreed that Marubeni would undertake certain hedging operations on the London Metal Exchange. In 2006, the price paid to Huckleberry was the sale price under the original agreement, less losses incurred by Marubeni in its hedging operations. Huckleberry argued it should be assessed on the basis of this revised price, rather than the set price in the original sales agreement. The province, in response, argued that the transaction value of the copper was the original price, and that the hedging losses were separate, and had no effect on the price paid to Huckleberry.

The Court preferred Huckleberry's calculation and analysis. The tax payable under the Act should have been calculated based on the amount that Huckleberry actually received, given the meaning of "transactional value of a mineral product" under s. 8. The Court concluded that Marubeni's hedging activities were relevant to determining the price, and that the tax payable by Huckleberry should be based on the lower price it was entitled to and actually received.

Torts

Aidan Cameron, Lindsay Burgess, Vivian Ntiri and Jack Ruttle

HUANG V. FRASER HILLARY'S LIMITED, 2018 ONCA 527

In this case, the Ontario Court of Appeal held that foreseeability of harm is not an element of the tort of nuisance.

The finding was made in the context of historical environmental contamination of a property neighbouring that owned by the defendant, Fraser Hillary's Limited, which had operated a dry-cleaning business in Ottawa since 1960. Between 1960 and 1974, solvents used in the dry-cleaning process were discharged and subsequently contaminated the soil and groundwater on a neighbouring property owned by Mr. Huang. According to Fraser, the solvents had been used in accordance with the best practices at the time, and the environmental dangers of the solvents were not known at the time. The contamination was not uncovered until 2003 during an environmental assessment of Mr. Huang's property.

Mr. Huang brought an action against Fraser. Fraser was found liable under the tort of nuisance and s. 99 of the *Environmental Protection Act* (EPA), and was ordered to pay damages of over C$1.8 million. Fraser appealed, arguing that foreseeability of harm was a constituent element of the tort of nuisance, and that the EPA was being applied retrospectively.

Fraser's appeal was dismissed. The Court held that foreseeability of harm is not an element of the tort of nuisance, noting that a foreseeability requirement would blur the distinction between negligence and nuisance and that there were good policy reasons for maintaining the independent strength of the tort of nuisance. This meant that despite the fact that the impact on Mr. Huang's property was not foreseeable at the time of Fraser's actions, Fraser could still be held liable in nuisance.

The Court also rejected Fraser's argument that the EPA was retroactively applied. Part X of the EPA imposes duties to report and remediate spills and imposes liability for damage caused by a spill, but was not in force until 1985, which was well after Fraser's spills ceased. However, the Court held that once s. 93(1) came into force, it imposed a duty on all those that had previously owned or controlled a pollutant at the time it was spilled to take steps to remediate it, regardless of whether that discharge was ongoing. Fraser did not comply with this duty, and so was liable under the EPA.

For further analysis of this decision, see McCarthy Tétrault's *Canadian ERA Perspectives* blog post entitled "Uncertain Ground: Owners May Be Liable for Unforeseeable Environmental Effects." Fraser has sought leave to appeal to the Supreme Court of Canada.

IMPERIAL METALS CORPORATION V. KNIGHT PIÉSOLD LTD., 2018 BCSC 1191

In this decision, the British Columbia Supreme Court struck out some third-party claims brought against the Province of British Columbia (Province) in an action arising from the 2014 breach of the Mount Polley Mine tailings storage facility (Facility) in British Columbia.

Mount Polley Mining Corporation (Company), and its parent company, had sued two engineering firms (Engineers) seeking damages arising from the breach. The Engineers in turn filed third-party claims against the Province alleging that the Province was liable to the plaintiffs for negligent regulatory oversight. The Province's Chief Inspector of Mines, and his Ministry staff, had issued the permits for the construction of the facility; reviewed all subsurface investigation reports, design reports, bi-monthly progress reports, as-built reports, and annual raise design reports; and annual inspection reports; issued amendments to them; conducted on-site geotechnical inspections; and hired third-party consultants to review the work of the Engineers and provide advice in respect of such work.

The Court struck out all third party claims that alleged the Province owed a duty of care to the Engineers, but allowed some of the claims alleging the Province owed a duty of care to the mine owner. In doing so, the Court articulated a narrow set of circumstances in which sufficient "proximity" could exist to establish a duty of care between a regulator (the Province) and the regulated (the Company). As a starting proposition, the Court held that where a regulator deals with a regulated party for the purpose of administering and enforcing a statutory scheme, the general rule is that such interactions will not give rise to a relationship of proximity and therefore no duty of care arises. In coming to this conclusion, the Court chose not to follow jurisprudence that imposes such a duty of care in analogous circumstances involving building inspectors and property owners.

After articulating the general rule, the Court then outlined a set of exceptions that could give rise to sufficient proximity for a duty of care to arise, including: (i) where the governing statute provides a mandatory obligation on the regulator to take regulatory action in the face of foreseeable harm to human safety or the environment; (ii) where the

regulator steps outside the role of regulator and assumes the role of designer, developer or advisor to the regulated party; (iii) where the regulator acquires knowledge of serious and specific risks to a clearly defined group of the class that the statutory scheme was intended to protect; (iv) where the regulator makes a specific misrepresentation to the regulated party that invites reliance; and (v) where interactions between the regulator and the regulated party give rise to expectations that the regulator will consider the interests of the regulated party. Subject to the foregoing exceptions, the Court held that any duty of care based solely on conduct within the regulator's powers to regulate should be struck.

Some of the Engineers' allegations fit within the Court's articulated exceptions and the Court granted the Engineers leave to amend their respective Third Party Notices to remove any claims that did not fit within one of the exceptions and, where necessary, to re-cast the claims to conform with the Court's decision.

About McCarthy Tétrault

McCarthy Tétrault LLP provides a broad range of legal services, advising on large and complex assignments for Canadian and international interests. The firm has substantial presence in Canada's major commercial centres as well as in New York City and London, U.K.

Built on an integrated approach to the practice of law and delivery of innovative client services, the firm brings its legal talent, industry insight and practice experience to help clients achieve results that are important to them.

Our lawyers work seamlessly across practice groups and regions representing Canadian, U.S. and international clients. In the past five years, we have acted for 43 of the largest 50 Canadian companies and for 30 of the largest 50 foreign-controlled companies in Canada.

McCarthy Tétrault's clients include mining companies, public institutions, financial service organizations, manufacturers, the pharmaceutical industry, the oil and gas sector, energy producers, infrastructure companies, technology and life sciences groups, and other corporations. We have acted for our clients in all practice areas, including:

- Aboriginal Law
- Antitrust & Competition
- Arbitration
- Bankruptcy & Restructuring
- Capital Markets
- Class Actions
- Commercial Litigation
- Construction
- Environmental Law
- Intellectual Property
- International Trade & Investment Law
- Labour & Employment
- M&A
- Mining
- Private Equity & Venture Capital
- Procurement
- Professional Responsibility
- Real Estate
- Securities
- Tax
- Toxic Torts

For more information, please visit www.mccarthy.ca to contact any of our lawyers.

Recipient

mccarthy tétrault

VANCOUVER
Suite 2400, 745 Thurlow Street
Vancouver BC V6E 0C5

CALGARY
Suite 4000, 421 7th Avenue SW
Calgary AB T2P 4K9

TORONTO
Suite 5300, TD Bank Tower
Box 48, 66 Wellington Street West
Toronto ON M5K 1E6

MONTRÉAL
Suite 2500
1000 De La Gauchetière Street West
Montréal QC H3B 0A2

QUÉBEC CITY
500, Grande Allée Est, 9e étage
Québec QC G1R 2J7

NEW YORK, US
55 West 46th Street, Suite 2804
New York, New York 10036

LONDON, UK
125 Old Broad Street, 26th Floor
London EC2N 1AR
UNITED KINGDOM