mccarthy tetrault

Mining in the Courts
Year in Review

Vol. XIV - March 2024

mccarthy tetrault

Welcome to *Mining in the Courts*, 2024

Welcome to the 14th annual edition of *Mining in the Courts*, a publication of McCarthy Tétrault LLP's Mining Litigation Group that provides a one-stop annual update on legal developments impacting the mining industry.

Over the past year our courts have heard a variety of mining-industry disputes across all areas of law, as showcased in the pages that follow.

Two prominent themes include the continued grappling with environmental and regulatory issues, and navigating the boundaries of the Crown's duty to consult Indigenous Peoples. In **The Supreme Court of Canada Rules that Part of the Federal Impact Assessment Act Is Unconstitutional** we discuss the Supreme Court of Canada's controversial ruling on Federal environmental impact assessments, and in **B.C. Mineral Tenure Regime Contravenes the Duty to Consult** we discuss key developments in mineral tenure and licencing in British Columbia and the Crown's duty to consult.

Other noteworthy articles in this edition include **More Than an Emoji, but Less Than a Signed Contract**, which discusses an unsigned term sheet for an overriding gross royalty interest that was enforced in Ontario. On the human resources side, we discuss immigration issues associated with building global project teams in **Resourcing Innovation: Effectively Building Project Teams Utilizing Global Resources** and a recent Supreme Court of Canada ruling impacting the responsibility of owners undertaking construction projects in **Ontario's Occupational Health and Safety Regime for Construction Projects Reviewed by the Courts: A Discussion of Diligence Measures for Mining Employers**.

Interspersed with these articles are snapshot summaries of the other important court decisions you need to know about, and which highlight the significant impacts the mining sector has had on the development of Canadian law.

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

For more information please contact:

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

Assistant Editor
Lindsay Burgess, Associate
604-643-7954
lburgess@mccarthy.ca

Assistant Editor
Val Lucas, Associate
604-643-5988
vlucas@mccarthy.ca

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

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

Andrew Kalamut, Partner
416-601-8241
akalamut@mccarthy.ca

A very special thank you to all of our contributors who are noted throughout the publication, and to our student contributors Vincent Couto, Eric Driver, Laura Fernz, Katherine Griffin, Erin Jackes, Tanner Lorenson, Kyra McGovern, Nico Rullmann, Declan Sakuls, Sharan Sandal, Dustin Seguin, Sarah Xu and Matthew Yensen.

Table of Contents

Case Law Summaries

Aboriginal Law

Bryn Gray, Daphne Rodzinyak and Heather Maki

In the past year, Canada saw a number of Aboriginal law and policy developments with implications for the mining sector. This includes the decision of the Supreme Court of British Columbia in *Gitxaala v. British Columbia (Chief Gold Commissioner)*,[1] concluding that the province has a duty to consult potentially affected Indigenous groups when registering mineral claims (see **B.C. Mineral Tenure Regime Contravenes Duty to Consult**). As well, a recent decision of the Supreme Court of Yukon quashed the approval of a proposed mine on the basis of inadequate consultation and ordered further consultation on a narrow issue with a prescribed timeline. There were also decisions relating to the threshold required to trigger the duty to consult, the test for Aboriginal title to submerged lands and a successful misfeasance claim by a proponent against a provincial government that denied permits for a project.

1 **2023 BCSC 1680**.

Yukon Court Orders Further Consultation on Proposed Mine

The Supreme Court of Yukon recently set aside a decision under the ***Yukon Environmental and Socio-economic Assessment Act*** (YESAA) that allowed an open-pit and underground mining project to proceed to the regulatory permitting stage, subject to certain terms and conditions (Decision). In *Ross River Dena Council v. Yukon (Government of)*, **2024 YKSC 1**, the Court found that the decision-makers within the Yukon and federal governments did not adequately consult the Kaska Nation[2] (Kaska) on their final submission during the YESAA process, and it ordered further consultation within prescribed timelines. This case raises numerous notable issues, including the Court's approach to assessing the meaningfulness of consultation, the timelines ordered within the remedy, how the Court dealt with cumulative effect concerns, and how the Court dealt with arguments that it could not rely on the proponent's engagement efforts in assessing the adequacy of consultation.

This decision relates to the Kudz Ze Kayah Project, a copper, lead and zinc mine proposed by BMC Minerals Ltd. (BMC). The project is within the traditional territory of the Kaska where they assert Aboriginal rights and title.

The Court dismissed the majority of the issues raised by Ross River Dene Council (RRDC) on behalf of the Kaska but ruled there was a breach of the Crown's duty to consult arising from the Crown's inadequate treatment of a submission made by the Kaska on June 14, 2022, one day before the Decision was issued. The Court found that the deep consultation required in this case demanded meaningful dialogue with respect to the June 14, 2022 submission and that a written response provided after the Decision was issued was inadequate. The Court was also critical of the three weeks' notice provided regarding a hard deadline for making a decision, which it found was inconsistent with a prior pattern of soft deadlines and regular extensions. The Decision was set aside to allow a consultation meeting on the June 14, 2022 submission and specified the meeting must happen within 60 days.

This case is an example of increased judicial scrutiny related to the meaningfulness of consultation and the importance of two-way verbal dialogue, where possible, in addition to written communication, particularly when deep consultation is owed. It also highlights how continued extensions of processes can create expectations relating to how consultation will come to a close and that any shift to hard deadlines must be communicated with appropriate notice.

The remedy in this case is interesting. It is quite prescriptive in terms of setting out the timelines for further consultation, which is unusual, although that may have been influenced by findings about the Kaska not fulfilling their reciprocal obligations in consultation at times. It remains to be seen whether this will become more common, particularly when there is a finding of inadequacy on a narrow ground.

For more on this decision see McCarthy Tétrault LLP's Canadian ERA Perspectives blog post entitled **Yukon Court Orders Further Consultation on Proposed Mine**.

2 The Kaska Nation comprises the Ross River Dene First Nation, Liard First Nation, the Daylu Dena Council, Dease River First Nation and Kwadacha Nation.

No Duty to Consult on Decision Declining to Designate Mine Extension Project for Environmental Assessment

In *Mikisew Cree First Nation v. Canadian Environmental Assessment Agency*, **2023 FCA 191** (*Mikisew Cree*), the Federal Court of Appeal recently held that the decision of the Minister of Environment and Climate Change to decline to designate CNRL's Horizon Oil Sands Mine North Pit Extension Project in Alberta as a reviewable project under the ***Canadian Environmental Assessment Act, 2012*** (CEAA 2012) did not trigger the duty to consult.

In a July 5, 2018 letter, the Mikisew Cree First Nation (MCFN) and other Indigenous groups requested that the then Canadian Environmental Assessment Agency designate the project under s. 14(2) of the CEAA 2012, which permits the Minister to designate a physical activity that may cause adverse environmental effects or public concern related to those effects. The MCFN expressed concern about the inability of the provincial assessment to adequately consider their Aboriginal rights. The Minister ultimately did not designate the project. The decision was brought to the Federal Court for judicial review by MCFN in February 2019, challenging the adequacy of consultation and the reasonableness of the decision on administrative law grounds.

The extension project involves a plan to extend the already existing Horizon mine an additional 18% in total area within the current lease boundaries. The expansion would extend the operating life of the Horizon mine by approximately seven years. This extension project was not a designated project for CEAA 2012. However, it was subject to a provincially regulated environmental assessment under the Alberta ***Environmental Protection and Enhancement Act***, and there was no dispute that First Nations were provided with the right to participate in the provincial environmental assessment process.

The Federal Court dismissed the judicial review and the Federal Court of Appeal dismissed the appeal. With respect to triggering the duty to consult, the Court of Appeal turned to the test articulated by the Supreme Court of Canada in *Rio Tinto*:[3]

- the Crown must have knowledge, actual or constructive, of a potential Aboriginal claim or right;
- the Crown must be contemplating conduct or a decision that engages a potential right; and
- the Crown's decision or action has the potential to adversely affect the claim or right.

The Court of Appeal held that the second and third requirements were not met because there was no contemplated conduct of the federal Crown capable of adversely impacting the MCFN's Aboriginal or treaty rights. There was an ongoing mandatory provincial environmental assessment, in which the MCFN had the right to participate and be consulted. Therefore, any adverse impacts would flow from an approval of the project by the Alberta Energy Regulator, not the federal Crown's designation decision.

The Court of Appeal confirmed that consultation obligations extend to both the federal and provincial crowns, and that each owes an independent duty to consult with respect to their own conduct or decisions. Thus, the federal Crown was not responsible for ensuring that the provincial Crown met its independent duty to consult. If, as the MCFN allege, the provincial environmental assessment process unreasonably failed to adequately discharge the provincial Crown's consultation obligations, it would be a matter for assessment by the Alberta courts.

The *Impact Assessment Act* has a similar designation process to that of the CEAA 2012. Although the Supreme Court of Canada (SCC) recently held that the scheme of the IAA relating to designating projects for review was unconstitutional, it is not expected that the process for requesting designations for non-designated projects will materially change. For further commentary on the SCC decision in *Reference re Impact Assessment Act*, **2023 SCC 23**, see **The Supreme Court of Canada Rules that Part of the Federal Impact Assessment Act is Unconstitutional**.

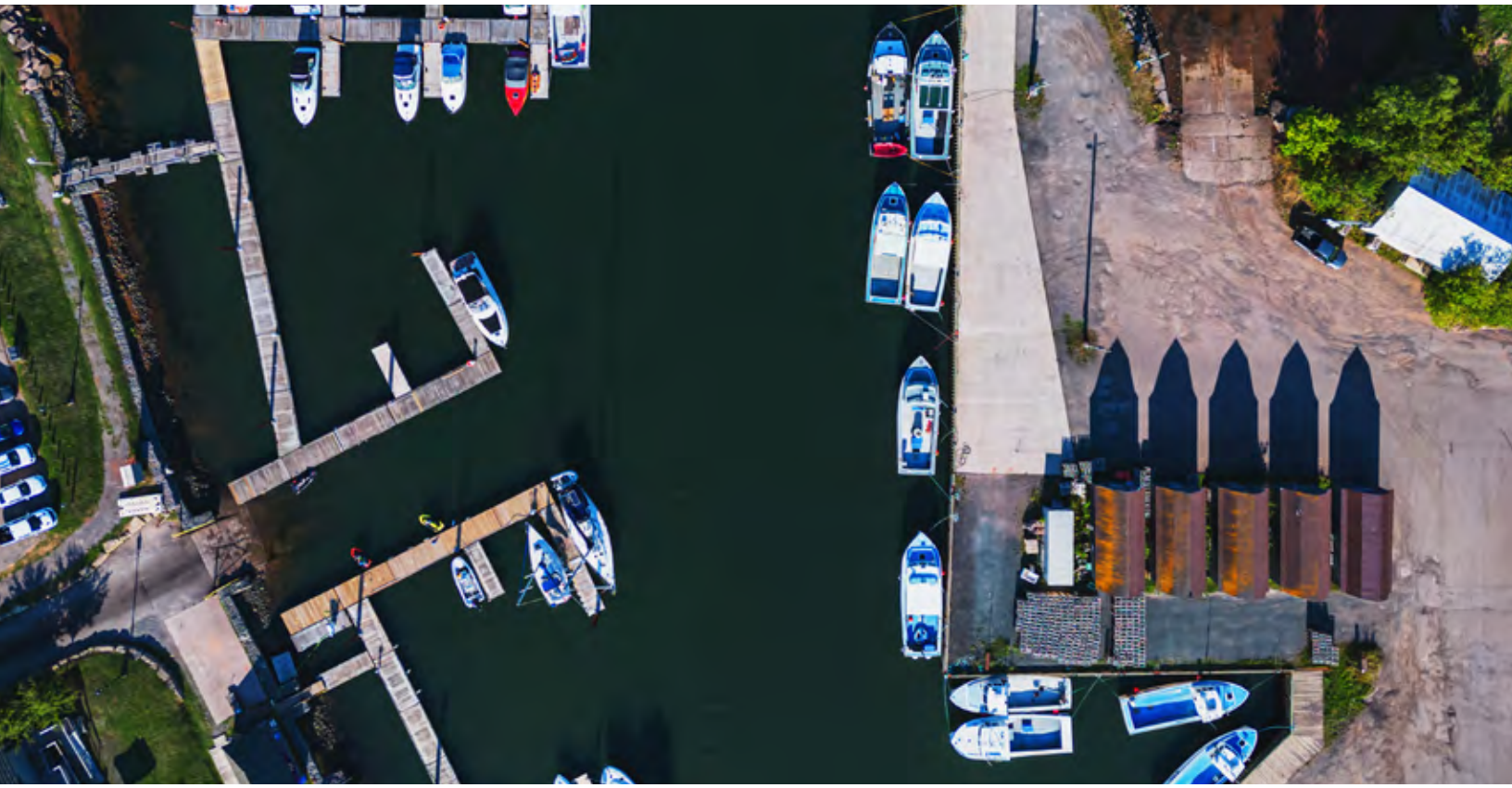
3 *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, **2010 SCC 43**.

Unsubstantial or Negligible Adverse Impacts Insufficient to Trigger the Duty to Consult

In *Waterhen Lake First Nation v. Saskatchewan (Minister of Parks, Culture and Sport)*, **2023 SKKB 230**, the Saskatchewan Court of King's Bench recently concluded that "unsubstantial" or "negligible" adverse impacts to Aboriginal treaty rights resulting from Crown conduct did not trigger the duty to consult. The Court found that the provincial Crown had no duty to consult Waterhen Lake First Nation (WLFN) prior to approving a work permit for an inland marina on Waterhen Lake in Meadow Lake Provincial Park because WLFN failed to establish that the impacts were appreciable or "beyond insignificant and negligible."

The evidence in this case established that the construction of the inland marina would have certain impacts to WLFN's treaty harvesting rights, including closing a trail that would require a "modest detour" to access hunting and trapping grounds and the excavation of 200 feet by 250 feet, which could result in the loss of some plants gathered by the WLFN. The Court acknowledged this loss but found it to be "very modest" once put within the context of a 450-km shoreline that was accessible to WLFN members in which plants could still be gathered, and WLFN members did not have to travel further distance or undergo difficulty or increased time to gather.

The Court's conclusion was based on a review of the Supreme Court of Canada decisions of *Mikisew Cree*[4] and *Rio Tinto*,[5] the Federal Court decision of *Brokenhead Ojibway First Nation v. Canada (Attorney General)*,[6] as well as the B.C. Court of Appeal decision, *R v. Douglas*.[7] This decision underscores the need for appreciable and non-negligible impacts to trigger the duty to consult, although governments take varying approaches to assessing this issue and may still engage for relationship, policy or risk mitigation reasons.



4 *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, **2005 SCC 69**.
5 *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, **2010 SCC 43**.
6 **2009 FC 484**.
7 **2007 BCCA 265**.

Dismissal of Aboriginal Title Claim to Lake Bed

In *Chippewas of Nawash Unceded First Nation v. Canada (Attorney General)*, **2023 ONCA 565**, the Ontario Court of Appeal largely upheld a lower court dismissal of an Aboriginal title claim to a large portion of the lake bed of Lake Huron and Georgian Bay. This case confirmed that the test for Aboriginal title, as set forth in *Tsihqot'in*,[8] applies to title claims to submerged lands without modification and will have implications for other Aboriginal title claims to submerged lands.

The Chippewas of Nawash Unceded First Nation and Saugeen First Nation (collectively, the SON) commenced two claims against Canada and Ontario seeking: (i) a declaration of Aboriginal title to part of the lake bed of Lake Huron and Georgian Bay; and (ii) declaratory relief and damages relating to an alleged breach of a promise made by the Crown in Treaty 45½ to protect the Bruce Peninsula. The trial judge dismissed the SON's Aboriginal title and treaty fiduciary duty claim but held that the pre-Confederation Crown breached the honour of the Crown in fulfilling Treaty 45½ and in some of the Crown's conduct relating to the negotiation of Treaty 72.

In dismissing the SON's title claim, the trial judge found that the SON had not established sufficient and exclusive use of the lake bed and had minimal use of the lake bed at the time of the assertion of sovereignty. Further, the trial judge held that the public right of navigation is "paramount" and the geographic location of the SON's claim area within the well-travelled waters of the Great Lakes conflicted with the exclusive nature of Aboriginal title. The SON notably claimed that title would give them the right to control every aspect of occupation of the water and that any incursion on that right (including defence, recreation, commerce, navigation etc.) would need to comply with s. 35 of the *Constitution Act, 1982*.

The SON asserted that the trial judge made numerous errors in determining the title issue, including in setting too high of a threshold to determine various aspects of the title test in light of the submerged nature of the lands. The Court of Appeal dismissed the various errors asserted by the SON and found, among other things, that the trial judge gave sufficient weight to the Aboriginal perspective; appropriately took into account the submerged nature of the land claimed; and did not set too high a threshold for determining control by SON of the claimed land. The Court of Appeal held that it was not possible to determine whether the public right of navigation conflicted with Aboriginal title until the extent of Aboriginal title in any part of the submerged lands, if any, is determined.

Although the Court of Appeal did not identify any error in the trial judge's approach to the determination of Aboriginal title, it held that the SON should not have to bring a new proceeding to determine if they could establish title to a smaller portion of the claim area. It ordered a further hearing by the trial judge to determine whether Aboriginal title can be established to a more limited area, which contemplates further evidence and pleadings. Leave to appeal to the Supreme Court of Canada has been sought by the SON and Ontario.

8 *Tsihqot'in v. British Columbia*, **2014 SCC 44**.

Proponent Recovers Millions in Damages for Misfeasance in Denying Permits

In *Greengen Holdings Ltd. v. British Columbia (Ministry of Forests, Lands and Natural Resource Operations)*, **2023 BCSC 1758**, the B.C. Supreme Court awarded a hydroelectric project proponent C$10.125 million in damages for a lost business opportunity after finding the B.C. government liable for the tort of misfeasance in public office relating to the denial of project permits opposed by a First Nation. The permits were for a run of river project near Squamish, B.C. and were opposed by the Squamish Nation (SN) based on alleged impacts to certain cultural sites established by a **Land Use Agreement** entered into between the province and the SN. The Court found misfeasance — which is a misuse of power by a government office holder — after concluding that an Assistant Deputy Minister had improperly intervened to ensure the permits were denied.

Greengen Holdings Ltd. (Greengen) applied for permits to the Ministry of Agriculture and Lands and the Ministry of the Environment for land tenure over Crown land pursuant to the ***Land Act*** and a water licence pursuant to the ***Water Protection Act*** (collectively, the Permits). The Permits were subsequently denied and Greengen claimed that the denial of the permits was based, not on the reasons set out in the decision letters, but on collateral political purposes related to the province's relationship with the SN.

The tort of misfeasance may be made out by proving one of two alternative bases of liability: (i) Category A involves conduct specifically intended to injure a person or class of persons; or (ii) Category B involves a public officer who acts with knowledge both that they have no power to do the act complained of (in other words, the act is unlawful) and that the act is likely to injure the plaintiff. In this case, Greengen advanced its claim under Category B.

The Court concluded that the provincial representatives knew that denying the Permits would cause Greengen harm and found that the denial of the Permits was unlawful because the evidence demonstrated that the statutory decision-makers were prepared to approve the permits (and had concluded that consultation had been sufficient) but the permits were subsequently denied at the direction of an Assistant Deputy Minister, which fettered their decision making for improper purposes. The Court found that the Assistant Deputy Minister had communicated the denial of the Permits to the proponent in November 2008 before the statutory decision-makers had even made the denial decisions (which were communicated in writing in August 2009). The Court concluded that the Assistant Deputy Minister either made the decision himself or passed on a decision made by others that the project would not be allowed to proceed without the agreement of the SN and that this decision was made to appease the First Nation. Greengen was awarded C$10.125 million as a result of a lost business opportunity.

While the outcome of this decision was based on the specific facts, it is an important reminder to governments that applications for permits need to be considered on their merits by the appropriate statutory decision-makers in a procedurally fair way and that a proponent may have a remedy if a denial of a permit is influenced by other government officials for improper considerations.

Cases to Watch

CO-JURISDICTION BETWEEN FIRST NATIONS AND GOVERNMENT

In May 2023, certain Treaty 9 First Nations released a **draft statement of claim** against Canada and Ontario that seeks various declarations including that they hold treaty rights of "decision-making governance authority over land." Treaty 9, which includes similar land surrender language as the numbered treaties across Canada, covers a very large portion of northern Ontario to Hudson Bay and James Bay and includes the Ring of Fire. The First Nations assert that they did not surrender their jurisdiction relating to land, including submerged lands and natural resources, and that Treaty 9 intended for a sharing of jurisdiction with the Crown. The Treaty 9 First Nations are seeking equitable compensation in the amount of C$95 billion from Canada and Ontario for the breach of the Treaty and duties of the Crown.

This case is at a very early stage but will be an important case to watch given its potential implications for projects in Treaty 9 territory.

ABORIGINAL TITLE TRIAL DECISION IN B.C.

The B.C. Supreme Court is likely to release a decision this year in an Aboriginal title claim to lands in the City of Richmond, B.C. The alleged title lands are Crown lands owned by the City of Richmond and the Vancouver Fraser Port Authority (as agent of Canada), as well as private lands owned by numerous private parties holding fee simple titles derived from colonial and provincial grants. The Cowichan Tribes are seeking to recover the Crown lands but have previously clarified to the Court[9] that they are not seeking a declaration of invalidity or defectiveness to the fee simple interests in the private claim area, nor do they claim they are entitled to possession of such land as against any private landowner. That said, a finding of title does not preclude them from seeking dispossession in the future, and the declarations that they are seeking relating to infringement could affect future use of privately owned land if successful.

This case is one of the few Aboriginal title cases that have gone to trial and is unique from the other Aboriginal title claim trials to date that have been focused on Crown land in less developed areas. The private land issues and the consideration of the bona fide purchaser for value defence in the context of municipal lands could have implications for other current and future Aboriginal title claims to privately owned land in Canada. The trial was completed in fall 2023 and a decision is expected shortly. Any decision will likely be appealed and, if so, it will be several years before this issue is resolved.

9 *Cowichan Tribes v. Canada (Attorney General)*, **2017 BCSC 1575**.

UNDRIP Updates

2023-2028 ACTION PLAN

In June 2023, the government of Canada released its **UN Declaration Act Action Plan (Action Plan)**, pursuant to the federal ***UNDRIP Act***. This plan sets out 181 specific measures and adopts a distinction-based approach in organizing the measures into priorities that are shared among First Nations, Inuit, Métis, modern treaty and self-governing nations and diversity groups. The plan is ambitious and many of the commitments are broadly worded and open to varying interpretation.

The plan includes measures that have important implications regarding Indigenous consultation and considerations for project development, including but not limited to commitments to:

— develop new guidance on engaging with Indigenous Peoples on natural resources projects that aligns with UNDRIP and that "provides practical recommendations for successful free, prior and informed consent implementation;"

— pursue amendments to fisheries legislation, regulation or policies to support the meaningful implementation and exercise of Indigenous fishing rights;

— create measures that could enable Indigenous governments and organizations to exercise federal regulatory authority in respect of matters regulated by the Canada Energy Regulator;

— ensure the Impact Assessment Agency carries out impact assessments in a manner that aligns with UNDRIP, including an emphasis on free, prior and informed consent;

— establish an independent Indigenous rights monitoring and oversight mechanism for dispute and conflict resolution and remedies for infringements of individual and collective rights; and

— develop and implement measures to increase economic participation of Indigenous Peoples and communities in natural resource development.

There is a broad range of ways in which these commitments could be implemented and it remains to be seen how and when these commitments will be implemented. This work is expected to take considerable time and the federal government is required under the *UNDRIP Act* to annually report on their progress in implementing the Action Plan.

CONSENT DECISION-MAKING AGREEMENT

On November 1, 2023, the province of B.C. entered into the **second consent decision-making agreement** with the Tahltan Central Government under s. 7 of **DRIPA**, which provides for the negotiation of agreements with Indigenous governing bodies to jointly exercise statutory powers or to require the consent of the Indigenous governing body before the exercise of a statutory power of decision. This second agreement relates to proposed amendments to the environmental assessment certificate for the Red Chris mine project. The agreement sets out a process for the Tahltan to both participate in the provincial environmental assessment process and conduct its own risk assessment of certain proposed amendments to the Red Chris mine project and requires the seeking of the Tahltan's consent at various junctures. This comes about 18 months after the **first consent decision-making agreement**, which was entered into on June 6, 2022 between the province and the Tahltan Central Government, with respect to the proposed Eskay Creek gold-silver project.

As a formal recognition of the Tahltan Nation's right to manage resource development decisions within their traditional territory, these consent decision-making agreements are significant steps forward by all parties to implement the principles of UNDRIP in the environmental assessment process.

To date, the only consent decision-making agreements have been with the Tahltan Central Government in northern B.C. and for mining projects.

UNDRIP LEGISLATION IN THE NORTHWEST TERRITORIES

On October 10, 2023, the government of the Northwest Territories (GNWT) enacted **Bill 85**, the *United Nations Declaration on the Rights of Indigenous Peoples Implementation Act* (the *UNDRIP Implementation Act*). In much of the same way as the province of B.C. **enacted** DRIPA, the ***UNDRIP Implementation Act*** provides a framework to address the objectives of UNDRIP and further reconciliation by the GNWT.

The purposes of the *UNDRIP Implementation Act* are to affirm UNDRIP as a universal human rights instrument with application to Indigenous Peoples and laws of the Northwest Territories, to provide a framework for the implementation of UNDRIP, and to affirm the roles and responsibilities of Indigenous governments and organizations in the implementation of the UNDRIP.

The legislation is similar to the legislation enacted by the governments of B.C. and Canada in that it provides a framework to implement UNDRIP over time and it does not give immediate effect to UNDRIP. There are some differences in the legislation including that any Minister introducing legislation is required before second reading to table a Statement of Consistency prepared by the Attorney General regarding whether the bill is consistent with UNDRIP and s. 35 of the *Constitution Act, 1982*. The legislation also requires a five-year review of the legislation by an independent person or entity appointed by the joint Action Plan Committee.

Article

B.C. Mineral Tenure Regime Contravenes the Duty to Consult

Bryn Gray and Rachael Carlson

On September 26, 2023, the British Columbia Supreme Court in *Gitxaala v. British Columbia (Chief Gold Commissioner)* (*Gitxaala*)[1] declared that the provincial mineral tenure system has been implemented in a way that breaches the Crown's duty to consult. The declaration has been suspended for 18 months to allow the provincial government to design a regime that allows for Indigenous consultation prior to the registration of mineral claims. This could include amendments to the *Mineral Tenure Act* (MTA),[2] although the B.C. government has thus far been silent on the potential changes in store.

Gitxaala is the third duty to consult challenge to a provincial or territorial mineral tenure regime (and the second instance where a Court found a breach of the duty to consult). The implications of this decision are not, however, limited to mineral exploration. The Court also determined that the *Declaration on the Right of Indigenous Peoples Act* (DRIPA)[3] did not implement the UN Declaration on the Rights of Indigenous Peoples (UNDRIP, or the Declaration)[4] into the domestic law of B.C. and that the provision requiring the province to take steps to align provincial laws with UNDRIP did not create justiciable rights. This is the first substantive decision on the effect of DRIPA, although the determinations relating to DRIPA and UNDRIP are being appealed to the B.C. Court of Appeal.[5]

This article describes *Gitxaala* and its significant implications.

OVERVIEW OF *GITXAALA*

Under the MTA, "free miners" are allowed to register a mineral claim over unclaimed Crown land without consulting any Indigenous groups that have Aboriginal rights or title claims within the claim area. The registration of a claim provides the miner various rights, including the right to enter onto the surface of the claim area to conduct certain limited exploratory activities. It allows for the miner to collect and extract samples, dig trenches and remove ore; however, these activities are subject to limitations, including that all work must be performed with hand tools and that the amount of ore extracted and the size and quantum of pits or trenches not exceed prescribed limits. Certain more intrusive exploration activities and the extraction of minerals require approvals under the *Mines Act*[6] or other legislation, such as approvals under the *Forest Act*[7] for activities on Crown land, including tree felling and certain vegetation disturbance. The current provincial system provides for Indigenous consultation if the miner seeks to proceed to this deeper level of exploration or extraction.

There are approximately 30,000 mineral claims in B.C. and the chief gold commissioner (CGC) grants between 5,000 to 6,000 claims a year (although there are only 16 operating major mines in B.C. where commercial-scale extraction of minerals is occurring).[8]

In *Gitxaala,* the Gitxaala Nation and Ehattesaht First Nation (First Nations) argued that the Crown owes a duty to consult and accommodate prior to granting mineral claims on lands where Aboriginal rights or title are asserted. In addition, the First Nations submitted that the MTA was inconsistent with the rights recognized in DRIPA and UNDRIP, and they sought to quash certain mineral claims granted in their respective traditional territories.

DUTY TO CONSULT

There are three requirements to trigger the Crown's duty to consult:

1. the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right;
2. contemplated Crown conduct; and
3. the potential that the contemplated conduct may adversely affect an Aboriginal claim or right.[9]

The province conceded that the first two requirements were met but asserted that the granting of mineral claims does not create adverse impacts that are sufficient to trigger a duty to consult. The province argued that mineral claims are temporary and must be continued year to year, and the amount of disturbance of land from a mineral

1 *Gitxaala v. British Columbia (Chief Gold Commissioner),* **2023 BCSC 1680** [*Gitxaala*].
2 *Mineral Tenure Act,* **[R.S.B.C. 1996] c. 292.**
3 *Declaration on the Rights of Indigenous Peoples Act,* **[S.B.C. 2019], c. 44** [DRIPA].
4 UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples: resolution/adopted by the General Assembly, 2 October 2007, **A/RES/61/295** [UNDRIP].
5 Gitxaala Nation, "Gitxaała Nation appeals Court's refusal to apply UNDRIP and stop unconstitutional mineral tenures" (25 October, 2023), online: **https://gitxaalanation.com/gitxaala-nation-appeals-courts-refusal-to-apply-undrip-and-stop-unconstitutional-mineral-tenures/**. The appeal was filed October 25, 2023.
6 *Mines Act,* **[R.S.B.C. 1996], c. 293.**
7 *Forest Act,* **[R.S.B.C. 1996], c. 157.**
8 *Gitxaala* at para. 196.
9 *Haida Nation v. British Columbia (Minister of Forests),* **2004 SCC 73** at para 64. *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council,* **2010 SCC 43** at para. 31.

claim without a further permit is "nil or negligible," given the various limitations imposed, including that only hand tools can be used for exploration activities. The First Nations asserted that the mineral-staking regime had two types of adverse impacts: (i) non-physical impacts (including impacts to cultural and spiritual activities and to legal order and governance); and (ii) physical impacts (including disturbance of the land and loss of minerals and financial benefits).

Cultural and Spiritual Impacts

The Court held that the mineral-staking regime could be found to have an adverse cultural and spiritual impact on the First Nations, based on the removal of crystals (which were of cultural importance to the Ehattesaht) and other impacts to specific geographic areas and geologic formations the First Nations identified within their territories that had cultural or spiritual value. For the Gitxaala, this included potential impacts to Ksgaxlam (a place where they collected coloured chalk for the purpose of creating paints and markings) and Spanaxnanox (dens or territories) of naxnanox (supernatural beings or nature spirits) within Gitxaala territories, the location of which is a secret held within Gitxaala culture.

The Court highlighted the importance of viewing potential adverse impacts to cultural and spiritual locations from an Indigenous perspective and noted that the B.C. Court of Appeal had recently "indicated its approval of decision makers recognizing spiritual beliefs as worthy of protection"[10] in *Redmond v. British Columbia*.[11]

Physical Impacts to Minerals and Land

The Court held that granting mineral claims also resulted in the following physical impacts which trigger the duty to consult:

- **Loss of minerals:** a mineral claim holder can extract a limited amount of minerals and this removal would permanently reduce the value of the land subject to an Aboriginal title claim;
- **Loss of mineral rights:** Aboriginal title, if established, includes rights to subsurface minerals and the petitioners would be losing part of their asserted right to the minerals and the associated financial benefits; and
- **A non-negligible disturbance to the claimed land:** disturbance must be viewed from a First Nation's perspective and the potential physical disturbance authorized under a mineral claim would constitute an adverse impact.

With respect to the last point, the Court pointed to the specific physical activities that could be undertaken and the potential for cumulative impacts from mineral exploration activities:

> I note, by way of example, that the holder of a mineral claim has the right to engage in pitting, trenching, and drilling, and to conduct geological sampling using tools such as hand-held drills, and set up temporary residence on the claim area with tents, trailers, or campers. Further, numbers of adjacent cells are often obtained by individual recorded holders, leading to a cumulative effect on the First Nation asserting rights.[12]

In coming to this conclusion, the Court considered two existing cases on the duty to consult in the mineral-staking context that reached different conclusions. The province asserted that the Court should follow the decision of the Saskatchewan Court of Appeal in *Buffalo River Dene Nation v. Saskatchewan (Energy and Resources)* (*Buffalo River*),[13] which determined the duty to consult was not triggered by exploration permits because there was no adverse impact to harvesting rights from the authorized activities. The First Nations asserted the Court should instead follow the decision of the Yukon Court of Appeal in *Ross River Dena Council v. Government of Yukon*,[14] which concluded that a grant of a mineral claim under the Yukon Class 1 exploration program triggered the duty to consult.

The B.C. Supreme Court held that *Buffalo River* was distinguishable, and that *Ross River* was more analogous. The regime and factual circumstances considered in *Buffalo River* were different in that it only granted subsurface rights and did not authorize surface activities (which required further authorizations) and therefore did not impact the Buffalo River Dene Nation's treaty harvesting rights exercisable on the surface of the lands. In contrast to the facts in *Gitxaala*, the Buffalo River Dene Nation did not have a claim of Aboriginal title to the land (or subsurface resources such as minerals).

10 *Gitxaala* at para. 328.
11 *Redmond v. British Columbia (Forests, Lands, Natural Resource Operations and Rural Development)*, 2022 BCCA 72.
12 *Gitxaala* at para. 395.
13 *Buffalo River Dene Nation v. Saskatchewan (Energy and Resources)*, [*Buffalo River*].
14 *Ross River Dena Council v. Government of Yukon*, 2012 YKCA 14 [*Ross River*].

In *Gitxaala*, the province argued that the Yukon regime was distinguishable in that: (i) the activities undertaken through the Class 1 exploration program in the Yukon allowed for much greater impacts than that provided for under the MTA mineral-claims process; and (ii) the Yukon Court of Appeal erroneously concluded that Aboriginal title included subsurface rights, and, accordingly, this case ought to be distinguished. The Court in *Gitxaala* did not accept these arguments, finding that "[a]n overly narrow understanding of Aboriginal title, one that excludes the rights to subsurface minerals, is inconsistent with the goals of reconciliation and upholding the honour of the Crown,"[15] and that impacts due to physical activities ought to be considered from a First Nation's point of view.

UNDRIP AND DRIPA

UNDRIP is a UN General Assembly resolution that was passed in 2007. It contains 46 articles that set out a broad range of collective and individual rights of Indigenous Peoples. Canada initially opposed the Declaration (along with Australia, New Zealand and United States), but later issued a statement of qualified support in 2010 and a statement of unqualified support in 2016.

The province of B.C. announced it would implement UNDRIP in 2017 and the legislature passed DRIPA in 2019, which provides a framework to implement UNDRIP over time. DRIPA requires the government of B.C. to:

- ensure that B.C. laws are consistent with UNDRIP;
- develop and implement an action plan to achieve the objectives of UNDRIP in consultation with Indigenous Peoples; and
- report annually on its progress to align the laws of B.C. with UNDRIP and achieve the goals of the action plan.

Further details on the provincial action plan can be found **here**. The government of Canada passed similar framework legislation in June 2021.

The *Gitxaala* decision provided the first substantive consideration of DRIPA and its legal effect relating to the implementation of UNDRIP. The Court found that DRIPA did not implement UNDRIP into the domestic law of B.C. and the provision requiring the province to take steps to align the laws of B.C. with UNDRIP did not create justiciable rights.

DRIPA did not Give Legal Effect to UNDRIP

In considering the first issue, the Court outlined a fundamental principle of international law: a non-binding international instrument does not become a binding source of domestic Canadian law until implemented through legislation, even if endorsed by the executive branch of government. Implementing an international instrument into domestic law must be done expressly.

The Court rejected the B.C. Human Rights Commission's[16] assertion that DRIPA implemented UNDRIP into domestic law by affirming the application of UNDRIP to the laws of B.C. in the purpose section.[17] Section 2 of DRIPA provides that:

2. The purposes of this Act are as follows:

(a) to affirm the application of the Declaration to the laws of British Columbia;

(b) to contribute to the implementation of the Declaration;

(c) to support the affirmation of, and develop relationships with, Indigenous governing bodies.

The Court found that s. 2 of DRIPA was not intended to be a "rights-creating, substantive provision" but that it "simply contains statements of purpose to be used for interpreting the substantive provisions of the legislation."[18] In addition, while s. 2(a) affirms the application of UNDRIP to provincial laws, it also provides that DRIPA's purpose is to "contribute to" implementation of UNDRIP, strongly indicating "that s. 2(a) did not, in fact, accomplish 'implementation.'"[19] Further, ss. 4-5 of DRIPA place obligations upon the government to work to achieve alignment between the laws of B.C. and UNDRIP in consultation and co-operation with Indigenous communities, indicating that implementation is not effected by DRIPA.[20] The Court also referred to comments during legislative debates about DRIPA by the Minister of Indigenous Relations and Reconciliation, which supported the conclusion that DRIPA was not intended to give legal effect to UNDRIP.[21]

15 *Gitxaala* at para. 392.
16 The B.C. Human Rights Commission was an intervenor in the case. Both parties to the case accepted the proposition that UNDRIP has not been implemented into domestic law through DRIPA.
17 DRIPA, *s. 2.* reads: The purposes of this Act are as follows: (a) to affirm the application of the Declaration to the laws of British Columbia; (b) to contribute to the implementation of the Declaration; (c) to support the affirmation of, and develop relationships with, Indigenous governing bodies.
18 *Gitxaala* at para. 461.
19 *Gitxaala* at para. 464.
20 *Gitxaala* at para. 439.
21 *Gitxaala* at para. 467.

Accordingly, the Court concluded that UNDRIP remains "a non-binding international instrument" and that DRIPA instead "contemplates a process wherein the province, 'in consultation and cooperation with the Indigenous Peoples in British Columbia' will prepare, and then carry out, an action plan to address the objectives of UNDRIP."[22]

Provincial Obligation to Align Laws with DRIPA is not Justiciable

The Court next considered s. 3 of DRIPA, which provides:

> In consultation and cooperation with the Indigenous Peoples in British Columbia, the government must take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration.[23]

The Court held that the legislative language used in s. 3 indicates that it was not intended for the courts to adjudicate the question of that consistency. In particular, s. 3 contemplates Indigenous Peoples of B.C., not B.C. courts, being involved in the determination of whether the province's laws are consistent with UNDRIP.[24] The Court left an open question as to whether a failure to consult and co-operate with Indigenous Peoples, as required under DRIPA, would be a justiciable breach of the government's obligations that could be enforced through the Courts.

Notwithstanding these findings, the Court did articulate and demonstrate how UNDRIP could be used as an interpretive tool in the manner required under the *Interpretation Act*.[25] After finding that the duty to consult does arise in the mineral-staking process under the MTA, the Court was required to consider whether the CGC had the necessary authority and discretion to implement a consultation process (in which case the legislation would not be constitutionally invalid). The Court determined that the MTA did provide this authority and discretion and relied on s. 8.1 of the *Interpretation Act*, which requires the Court to construe the legislation in a manner that "upholds Aboriginal rights enshrined in s. 35 and set out in UNDRIP." Section 8.1 of the *Interpretation Act* states:

> 8.1 (2) … [E]very enactment must be construed as upholding and not abrogating or derogating from the aboriginal and treaty rights of Indigenous Peoples as recognized and affirmed by section 35 of the Constitution Act, 1982.
>
> (3) Every Act and regulation must be construed as being consistent with [UNDRIP].[26]

The Court examined the discretionary powers afforded to the CGC in implementing the mineral-staking process, and stated that "if there are two (or more) possibly valid interpretations of the *MTA*, then I am to construe the *Act* in a manner that is consistent with UNDRIP (*i.e.*, that protects Indigenous rights)."[27] The Court concluded that "the logical end-point of that analysis (when combined with the text, context, and purpose) is that the CGC has been improperly implementing the *MTA* by not providing for pre-registration consultation."[28]

Based on the interpretive weight provided to UNDRIP in *Gitxaala*,[29] the UNDRIP-related *Interpretation Act* provisions are likely to be a focus in future Aboriginal rights litigation dealing with provincial statutes. That said, the UNDRIP provision was not necessary to reach the conclusion in *Gitxaala* and the same conclusion could have been arrived at based solely on s. 8.1(2)(a) of the *Interpretation Act*, which relates to s. 35 rights under the *Constitution Act, 1982*.

REMEDY

In addition to declaratory relief, the First Nations sought an injunction to prohibit the granting of mineral claims in their respective territories and asked that certain existing mineral claims be quashed. The Court refused to grant an injunction for a number of reasons including that injunctive relief may have resulted in the First Nations receiving greater accommodation through the interim measures than through a final determination on such issues, which would not be an appropriate outcome.[30]

With respect to the request to quash existing mineral claims, the Court concluded that quashing the existing claims would not be consistent with the "forward looking" nature of the duty to consult[31] and that mineral claim registrations were not decisions *per se* but interests

22 Gitxaala at para. 466.
23 DRIPA, s. 3.
24 *Gitxaala* at para. 488.
25 *Interpretation Act*, **[RSBC 1996], c. 238**.
26 *Interpretation Act*, **[RSBC 1996], c. 238**, s. 8.1.
27 *Gitxaala* at para. 416.
28 *Gitxaala* at para. 418.
29 As well as in *Kits Point Residents Association v. Vancouver (City)*, **2023 BCSC 1706**, released shortly thereafter.
30 *Gitxaala* at para. 526.
31 *Gitxaala* at paras. 546-547.

granted previously under a legislative scheme that was presumed to be valid, which engaged the *de facto* doctrine. This doctrine "gives effect to the justified expectations of third parties who relied upon the government actors administering invalid laws."[32] It was also noted that the impugned mineral claims were not distinct from any other existing claims in the First Nations' traditional territory, and "quashing of the impugned claims could bring into question the validity of other mineral claims filed in the same time reference."[33] Accordingly, the Court refused to quash any existing mineral claims in the First Nations' respective territories.

The Court ultimately held that declaratory relief was sufficient and suspended the declaration for 18 months, recognizing the practical reality that the CGC would need to design and implement a consultation program.

Implications

Gitxaala Nation is appealing certain aspects of the judgment, including the Court's refusal to quash any of the existing mineral claims that were granted without meeting the duty to consult, as well as the Court's conclusions on the impact of UNDRIP in provincial law. This will be an important appeal to watch particularly on the UNDRIP issue.

In the meantime, the decision has several important implications.

First, it requires the province of B.C. to restructure its mineral tenure registration regime to enable consultation prior to registration, which is going to impact the length of time required to obtain mineral claim registrations and may result in mineral claims being denied or additional Indigenous-related conditions being imposed. The province has so far not publicly stated how it proposes to address this issue or what opportunities Indigenous groups and industry will have to provide input on any of the proposed changes. It has also not publicly stated whether there would be any interim measures put in place. This is surprising given the fact that the B.C. government committed almost two years ago in its action plan to modernize the MTA, which was clearly in response to this pending litigation. The B.C. government has until March 2025 to put a new regime in place providing for consultation.

Second, this successful challenge to the B.C. mineral tenure regime — and the confirmation that Aboriginal title includes subsurface mineral rights — may lead to legal challenges to other provincial or territorial mineral tenure regimes[34] and greater expectations for financial compensation relating to mineral exploration activities. However, as has been seen with the different outcomes in *Buffalo River* and *Ross River,* the outcome of any challenge will be based on the particular factual circumstances, including what activities a mineral claim registration allows for without additional permits and how those activities intersect with asserted or established Aboriginal or treaty rights. The *Gitxaala* decision was in large part driven by the credible Aboriginal title claims of both groups, which is not the case in many other areas of the country, including lands subject to historic treaties with land surrender provisions.

Third, this decision illustrates how potential cultural and spiritual impacts can trigger the duty to consult and how the extent of the impact can be more significant, based on cumulative impacts. This can be a challenging area for government and proponents, given that information on cultural and spiritual sites of importance are often not publicly available. However, this is a topic that can be advanced through dialogue and clear information from Indigenous groups about the location of areas of concern, provided there are appropriate confidentiality restrictions.

Fourth, the Court confirmed that impacts to a First Nations' legal order, decision-making and governance are not impacts that trigger the duty to consult in a pre-proof Aboriginal title context. The Court accepted the province's arguments that it is not an adverse impact in and of itself for the province to allow third parties onto Crown lands subject to title claims, and that for the duty to consult to be triggered, the Crown conduct must impede the First Nation's ability to govern their land in the future if title is established. Interference with their ability to govern at present is not an impact that triggers the duty to consult. This case is consistent with prior jurisprudence both from the B.C. Court of Appeal and the Yukon Court of Appeal, which underscores that the purpose of the duty to consult is "not to provide claimants immediately with what they could be entitled to upon providing or settling their claims."[35] While this is not a new legal principle, it is a helpful reiteration of the law on this issue.

32 *Gitxaala* at para. 544.

33 *Gitxaala* at para. 549.

34 For example, recently Chiefs in Ontario have called for a one year pause on mineral staking in that province, following a similar request in 2022 from the Anishinabek First Nation. See CBC News, *Chiefs of Ontario call for 1-year pause on staking mining claims in the province* (26 January 2024), online: **https://www.cbc.ca/news/canada/sudbury/chiefs-of-ontario-call-for-1-year-pause-on-staking-mining-claims-in-the-province-1.7095129**.

35 *Gitxaala* at para. 280, citing *Ross River Dena Council v. Yukon*, **2020 YKCA 10** at para. 280.

Finally, *Gitxaala* clarifies the current legal status of UNDRIP in B.C., subject to the pending appeal. The outcome is consistent with the purpose of the legislation as reflected in the statutory language and the statements by the B.C. government when the legislation was introduced. This does not, however, align with the expectations and positions taken by many Indigenous groups and is likely to be a source of continued litigation even beyond the pending appeal.

There is likely to be further debate of the legal status of UNDRIP more broadly including as a result of a Quebec Superior Court[36] decision that came to a different conclusion with respect to the federal UNDRIP legislation (which is also under appeal on various grounds)[37] and a recent Supreme Court of Canada decision. In the *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, the Supreme Court of Canada stated that UNDRIP "has been incorporated into the country's positive law by the *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021."[38] This comment relates to federal legislation that is worded similarly to DRIPA and provides a framework for the federal government to implement UNDRIP over time. Although viewing this comment in isolation may lead some to conclude that UNDRIP is of binding legal force in Canadian law, a proper reading of this statement in the context of the remainder of the decision and the applicable legal principles indicates this is not the case. Instead, it appears this statement is intended to convey that UNDRIP has been incorporated in Canada's positive law because there is domestic law that requires the federal government to align its laws with UNDRIP and affirms that UNDRIP can be used as an interpretative aid.

By contrast, interpreting the Supreme Court's comment as suggesting that UNDRIP had been given direct legal effect in Canada would be inconsistent with other aspects of the Supreme Court's decision, including statements that one of the purposes of the *Act respecting First Nations, Inuit and Metis children, youth and families*, S.C. 2019, c. 24 was "implementing aspects of UNDRIP in Canadian law."[39] This purpose would be unnecessary if the federal UNDRIP legislation had already given legal effect to UNDRIP in Canada. The broader context also indicates that if the Supreme Court's comment were read as an assertion that UNDRIP is of binding legal force domestically, this would be inconsistent with: (i) the statutory language used in the federal UNDRIP legislation, including the federal government's obligation to align Canada's laws with UNDRIP in consultation and co-operation with Indigenous Peoples (which was referred to by the Supreme Court and would be unnecessary if UNDRIP had already been given immediate legal effect); and (ii) statements made by the federal government when the legislation was introduced, including that it "would not give the Declaration legal effect in Canada beyond its existing role as a source for interpreting Canadian laws."[40]

This is not to suggest that the status quo will remain but rather a reflection of the fact that the federal government intended its implementation of UNDRIP to be achieved through a collaborative process with Indigenous Peoples over time and not through a single piece of legislation. The *Act respecting First Nations, Inuit and Metis children, youth and families* was a step in that process and the federal government has released an ambitious Action Plan to implement UNDRIP through various legislative and policy measures that are intended to be developed over time in consultation and co-operation with Indigenous Peoples. Undoubtedly, there will be continued debate and litigation on the legal status of UNDRIP in Canada, the use that can be made of UNDRIP as an interpretive tool while steps are taken to implement UNDRIP, and whether the obligation to align federal and B.C. laws with UNDRIP is justiciable. The recent Supreme Court decision and other existing legal principles provide some indication of how domestic legislation that sets out a plan to implement UNDRIP over time, or which references UNDRIP, could be used in interpreting legislation (in the Supreme Court's decision, for the purpose of determining a law's pith and substance), but there remain many questions to be resolved in future cases.

36 *R. c. Montour*, **2023 QCCS 4154.**

37 CBC News, "Quebec appeals 'landmark' decision recognizing Kanien'kehá:ka treaty right to trade tobacco" (11 January 2024), online: **https://www.cbc.ca/news/indigenous/quebec-appeals-treaty-right-tobacco-trade-1.7080655**. The appeal was filed December 1, 2023.

38 *Reference re An Act respecting First Nations, Inuit and Metis children, youth and families*, 2024 SCC 5 ("*Bill C-92 Reference*") at para. 4.

39 *Bill C-92 Reference* at para. 47.

40 Department of Justice, "Bill C-15: An Act Respecting the United Nations Declaration on the Rights of Indigenous Peoples", online: **https://www.justice.gc.ca/eng/trans/bm-mb/other-autre/c15/qa-qr.html**.

Case Law Summaries

Administrative Law

Jack Ruttle

Ecology Action Centre v. Nova Scotia (Environment and Climate Change), 2023 NSCA 12

This decision concerns the test for public interest standing. The Nova Scotia Court of Appeal granted two non-profits, Ecology Action Centre and New Brunswick Anti-Shale Gas Alliance, public interest status, meaning they could pursue a judicial review of a decision conditionally approving a liquefied natural gas (LNG) project.

In 2013, Pieridae Energy (Canada) Ltd., an energy infrastructure developer, began pursuing development of an LNG export facility in Goldboro, Nova Scotia. The Minister of Environment and Climate Change conditionally approved the project in 2014. The approval required Pieridae to submit a "Greenhouse Gas Management Plan."

Pieridae did not. In 2021, the Minister issued another conditional approval for a highway realignment required for the LNG project.

The petitioners applied to judicially review the Minister's 2021 highway realignment approval. They raised two arguments: concerns about climate impact (i.e., Pieridae's failure to deliver the Greenhouse Gas Management Plan); and the risk of environmental harm posed by the highway realignment. The Nova Scotia Supreme Court held that the petitioners lacked public interest standing to challenge the Minister's decision. The Court of Appeal disagreed.

The test for public interest standing includes whether there is a "serious issue" to be litigated. The lower court had decided the issues the petitioners raised — climate impact and risk of environmental harm — were not "serious." The Appeal Court rejected the lower court's approach on both issues. First, the lower court had characterized the climate argument as an improper attempt to indirectly challenge the Minister's 2014 conditional approval of the project. Not so, according to the Appeal Court. Rather, the petitioners' complaint was that, in making the 2021 decision, the Minister had failed to consider Pieridae's failure to deliver a mandatory climate impact-related requirement, namely the Greenhouse Gas Management Plan. Second, the lower court, among other errors, had incorrectly faulted the environmental harm argument because it was not about "climate change." Given the *Environment Act* was at issue, the focus should be on overall environmental effects, not just climate change.

Ultimately, the Appeal Court decided the issues the petitioners raised were "serious" and that they had otherwise met the test for public interest standing. The non-profits were therefore allowed to proceed with their judicial review challenging the 2021 highway realignment approval.

Fellhawk Enterprises Ltd. v. Yukon Water Board, 2023 YKSC 42

Fellhawk Enterprises Ltd. is a family-run placer mining company. It sought a water licence and land use approval, both issued by the Yukon Water Board (Board), to allow it to proceed with placer mining on two of its claims. The Board denied both. In this decision, Fellhawk successfully challenged those denials before the Yukon Supreme Court.

Fellhawk's placer claims are on North Henderson Creek. H.C. Mining Ltd. (HC) holds 53 placer claims, 46 of which are included in a water licence and mining land use approval issued for a 10-year term in that area. HC's 53 claims and the two Fellhawk claims make up a block of claims. Fellhawk worked for three years with the approval of HC. With HC's claims set to expire in 2025, Fellhawk applied for the water licence and land use approval from the Board. HC provided its written consent to the application.

The Board denied the licence and approval because of concerns that the claims Fellhawk wanted to develop overlapped with HC's existing licence. Fellhawk sought to judicially review the land use denial and appealed the refusal for a water licence. The Yukon Supreme Court held in Fellhawk's favour on both. The Board's decision denying the land use approval was unreasonable, and its refusal to issue a water licence was incorrect, for largely the same reasons. The Board merely speculated about issues that could arise from the overlapping licences and did not explain why proposed mitigation measures — including HC and Fellhawk's clear assurances that their mining would not actually overlap — would not resolve any issues. The Court remitted both matters to the Board for reconsideration.

Lempiala Sand & Gravel Limited v. Ontario (Ministry of Northern Development, Mines, Natural Resources and Forestry), 2023 ONSC 5605

This judicial review emerged out of a competition between two companies to excavate aggregate from the same Crown property.

Lempiala Sand & Gravel Limited and its competitor Milne Aggregates Inc. are both in the business of operating pits and quarries. They both wanted to excavate aggregate from the same Crown property northwest of Thunder Bay. To do so, they needed a permit from the Ontario Ministry of Northern Development, Mines, Natural Resources and Forestry. Milne and Lempiala each applied for the permit. The Ministry deals with aggregate permit applications on a first-come, first-served basis. It declined to consider Lempiala's aggregate permit application because it had already received and was considering a complete application from Milne.

In the course of this permit application duel, Lempiala successfully asked a court to quash the Ministry's acceptance of Milne's application (see *Lempiala Sand v. HMQ*, 2022 ONSC 248). The Ministry had deemed Milne's application complete, despite it having irregularities that arguably meant it fell short of what was required by the regulatory scheme. The Court found that the Ministry had provided insufficient reasons for departing from the requirements of the regulatory scheme. The Ministry then issued a reconsideration decision confirming its acceptance of Milne's application, this time with more fulsome reasons.

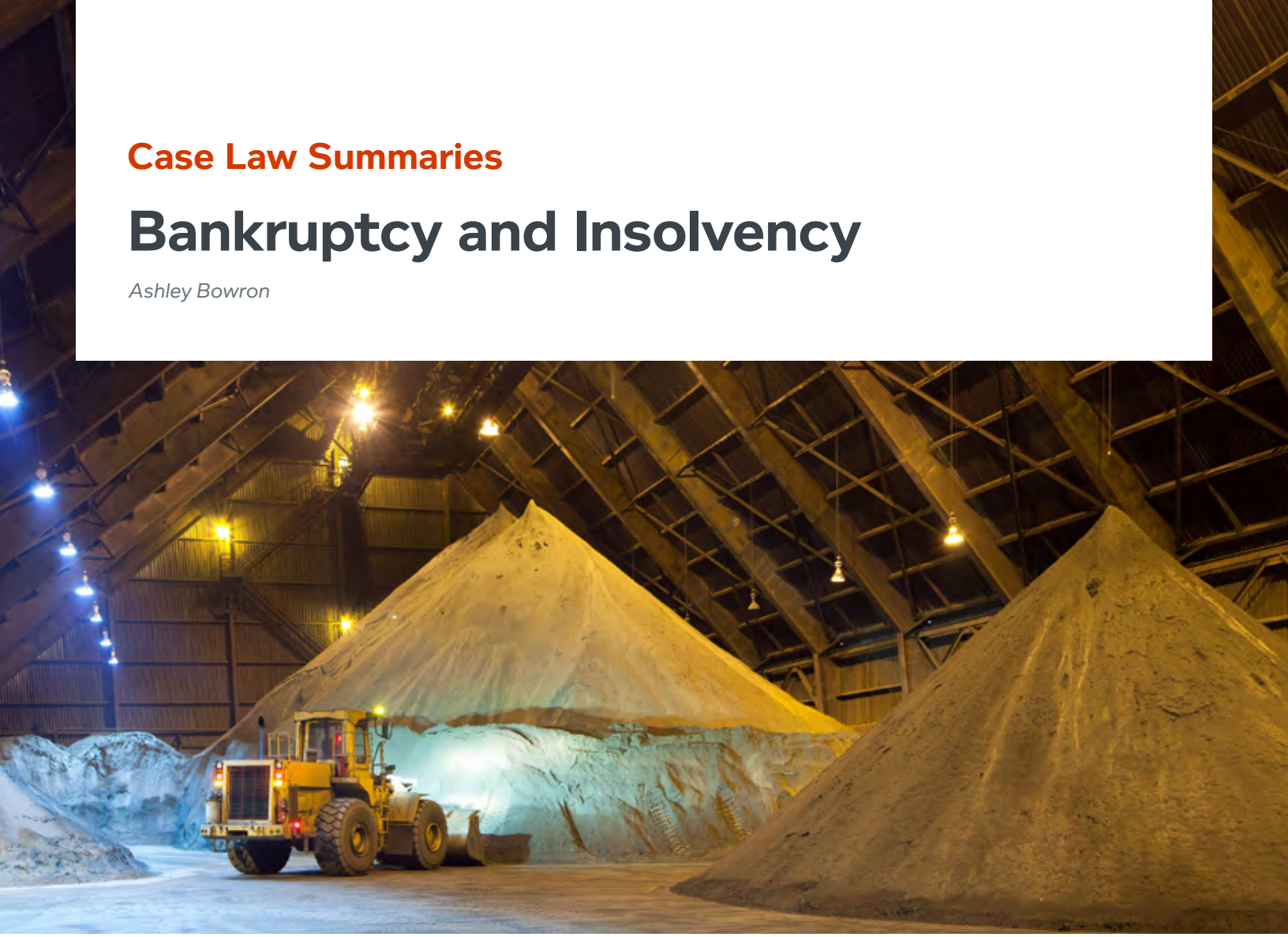
Lempiala went back to court to challenge this reconsideration decision. It argued that the Ministry unreasonably justified acceptance of Milne's aggregate permit application as complete (similar to the argument in its first judicial review) and failed to concurrently reconsider Lempiala's application together with Milne's application to determine which application was complete first.

The Court dismissed Lempiala's judicial review. The Ministry, in its reconsideration decision, had reasonably justified the reasons why it departed from certain Ministry policy requirements when approving Milne's application as complete. Further, the Ministry did not have to concurrently review Lempiala's application. Lempiala's argument here was premised on a single paragraph in the court's reasons granting Lempiala's first judicial review (see above). On Lempiala's reading of it, "the matter" remitted back to the Minister consisted of the competing applications from Lempiala and Milne, since Lempiala had raised the concurrency issue in a letter to the Ministry. The Court declined this broad reading of that passage of the first judicial review decision. Rather, it found the matter being remitted back to the Ministry for reconsideration was simply whether Milne's application was complete, not a broader contextual question regarding concurrency of the applications.

Case Law Summaries

Bankruptcy and Insolvency

Ashley Bowron



Brad Paddison Contracting Ltd. v. Minto Metals Corp., 2023 YKSC 67

In this decision, the Supreme Court of Yukon considered the question of competition priorities over mine concentrates when a lien was registered prior to transfer of ownership, but the purchaser had no means of discovering the registered lien. The Court ultimately held that the failure of a lienholder to provide proper notice of its claim meant that the purchaser was a *bona fide* purchaser for value without notice, and thus, the lien on the concentrate was extinguished.

Minto Metals Corp. (Minto Metals) owned an open pit and underground copper-gold-silver mine located near Whitehorse, Yukon (the Minto Mine). On July 22, 2019, Sumitomo Canada Limited (Sumitomo) and Minto Metals entered into an offtake agreement that allowed Sumitomo to buy 100% of the copper concentrate produced by the Minto Mine — up to 325,000 dry metric tonnes. The title to the concentrate would pass to Sumitomo once it made a payment of 90% of the estimated purchase price. Sumitomo would pay the final 10% following delivery. The offtake agreement specified that all concentrates were to be delivered free and clear of all encumbrances.

Brad Paddison Contracting Ltd. (BP Contracting) provided skilled labour and services to Minto Metals for projects at the Minto Mine. By October 11, 2022, BP Contracting was owed C$404,291.39 for its services. On November 9, 2022, BP Contracting registered a lien against Minto Metals, and the mineral claims and leases held by it, for the indebtedness. In the Form 1 Claim of Lien filed under the *Miners Lien Act*, BP Contracting described the property charged as "mineral claims and leases" but did not refer to or describe "minerals" or "concentrate." On May 13, 2023, Minto Metals abandoned the Minto Mine. At that time, approximately 10,877 dry metric tonnes of copper concentrate, owned

and paid for by Sumitomo, were left on the mine site. BP Contracting commenced this proceeding to enforce its lien.

Sumitomo argued that s. 2(1)(e) of the *Miners Lien Act*, combined with the transfer of title to the concentrate to it under the offtake agreement between December 1, 2022 and May 10, 2023, discharged BP Contracting's lien over the mineral concentrate. Section 2(1)(e) provides that "… the lien given by this subsection is a lien on … the mineral when severed and recovered from the land *while it is in the hands of the owner*" (emphasis added). The Court disagreed with Sumitomo's interpretation. In this case, where the lien was registered before title to the concentrate passed under the terms of the offtake agreement, the lien attached to the concentrate and could be followed to the purchaser. This accords with the purpose of the *Miners Lien Act* — to protect unpaid suppliers of goods and services to a mine and encourage investment by providing commercial certainty. If the legislature had intended that a validly attached lien could be discharged under the *Miners Lien Act* by a mere change of ownership of the subject property, it would have had to say that expressly in the legislation. Here, it had not.

While the lien was found to exist, the Court ultimately found that Sumitomo was not provided notice of the lien over the concentrate. BP Contracting failed to describe the concentrate in the registration documents, despite specifically describing mining claims and leases. The mere fact that the statute provides that mineral concentrate is a property to which a lien attaches is not sufficient to provide constructive notice. Here, there was no way for Sumitomo, even on the exercise of due diligence, to know about the encumbrance. Sumitomo was, therefore, a *bona fide* purchaser for value without notice, and BP Contracting's lien on the concentrate was extinguished.

Entes Industrial Plants Construction & Erection Contracting Co. Inc. v. Centerra Gold Inc., 2023 ONCA 294

In ***Mining in the Courts, Vol. XIII***, we reported on the Ontario Superior Court's decision in **2022 ONSC 4720** in which the Court approved a plan of arrangement, finding that the unsecured creditors (Creditors) did not have standing to oppose the arrangement. In that decision, the application judge also dismissed the Creditors' garnishment motion. The Creditors appealed the dismissal of their garnishment motion but did not appeal the order approving the plan of arrangement.

Centerra Gold Inc. (Centerra) is a Canadian-based mining company whose flagship asset was the Kumtor gold mine located in the Kyrgyz Republic (Republic), which it owned through its wholly owned subsidiary, Kumtor Gold Company CJSC (KGC). Kyrgyzaltyn JSC (KZN), a company wholly owned by the Republic was Centerra's largest shareholder. After Centerra's relationship with the Republic broke down and the Republic attempted to take control of the Kumtor Gold Mine, Centerra entered into an agreement with KZN and the Republic pursuant to which, among other things, Centerra would repurchase its shares from KZN, cancel them and transfer its ownership in KGC to KZN (Arrangement). The Arrangement was approved by the application judge.

The Creditors also sought to garnish a US$50 million intercompany payment from Centerra to KGC pursuant to the Arrangement. Unless the Republic could be characterized as a debtor to whom Centerra was obligated to make a payment, the Creditors could not garnish the

intercompany payment. In dismissing the Creditors' garnishment motion, the application judge rejected the Creditors' argument that the Republic had conducted a *de facto* expropriation of KGC from Centerra such that KGC lost its existence as a corporate entity. The Court of Appeal upheld the dismissal of the garnishment motion. It found that the lower court was alive to the distinction between *de jure* and *de facto* control and the evidence before it did not support the Creditors' argument that Centerra effectively lost all control over KGC and was deprived of all economic benefits from the mine.

Entes' application for leave to appeal to the Supreme Court of Canada was **denied** on January 11, 2024.

Reverse Vesting Orders Granted by the Supreme Court of Newfoundland and Labrador

Reverse vesting orders (RVO) are a novel restructuring order that we reported on in ***Mining in the Courts, Vol. XIII***. RVOs continued to be a significant topic of discussion in 2023. An RVO generally involves a series of steps whereby:

1. the purchaser becomes the sole shareholder of the debtor company;
2. the debtor company retains its assets, including key contracts and permits; and
3. the excluded liabilities and assets not assumed by the purchaser are transferred into a newly incorporated entity or entities (often referred to as 'ResidualCo').

The monitor then addresses these assets and liabilities through a bankruptcy or similar process.

Justice MacDonald of the Supreme Court of Newfoundland and Labrador granted two RVOs in the mining context in 2023. In both decisions, the Court noted that RVOs are exceptional orders only warranted in specific circumstances. Under current case law, courts should consider the following questions in addition to the factors under s. 36(3) of the *Companies' Creditors Arrangement Act* (CCAA): (i) is the RVO necessary; (ii) does the RVO structure produce an economic result at least as favourable as any other viable alternative; (iii) is any stakeholder worse off under the RVO than they would have been under any other viable alternative; and (iv) does the price paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) preserved under the RVO?

In *PricewaterhouseCoopers Inc. v. Canada Fluorspar (NL) Inc.*, **2023 NLSC 88**, the primary question at issue was the approval of a sale that involved an RVO. The Court found that the RVO was necessary to achieve the clear benefits of the purchase and therefore it was appropriate to approve the transaction in the circumstances. Specifically, the Court found that the RVO was necessary for the future operation of the mines, the process leading to the sale was reasonable, the RVO would produce a reasonably favourable economic result, the creditors were informed of the sale and none opposed the application, no creditor would be in a worse position, the price was fair and reasonable and, most importantly, the Monitor supported the use of the RVO.

Likewise, the Court also granted an RVO for the purchase of the Rambler Group in *Rambler Metals and Mining Limited, Re CCAA*, **2023 NLSC 134**. The Rambler Group owned the copper and gold Ming Mine, ancillary facilities, mineral leases and other property near Baie Verte, Newfoundland and Labrador. The Court previously approved a sales and investment solicitation process (SISP). The Rambler Group now sought approval of a sale of the shares of the Rambler Group to a prospective purchaser through an RVO. In this case, the RVO would cancel all the existing Rambler Group shares, and the purchaser would pay the purchase price in exchange for new common shares in Rambler Group. The Rambler Group would transfer the purchase price, excluded assets, excluded contracts and excluded liabilities to Newco. All claims attached to the excluded assets would be transferred to Newco. The Court found that the RVO was necessary due to the dozens of permits and licences held by the Rambler Group that it needed to maintain to operate the Ming Mine. Additionally, certain tax attributes of the transaction could only be preserved through the RVO. Combined, these features meant that an alternative restructuring mechanism would increase the cost, time and risk of restructuring and ultimately lead to less recovery for the secured creditors.

Re Mantle Materials Group, Ltd., 2023 ABKB 488

In this decision, the Alberta Court of King's Bench held that reclamation obligations arising from a gravel production business have super priority over secured creditors even when those obligations are not related to environmental obligations.

Mantle Materials Group, Ltd. (Mantle) operated 14 gravel pits on public land pursuant to surface material leases issued by Alberta Environment and Protection Areas (AEPA). Mantle also operated 10 gravel pits on private land pursuant to royalty agreements with the landowners. Mantle acquired these mines in the CCAA proceedings for JMB Crushing Systems Ltd. (JMB) via a reverse vesting order (RVO). AEPA had issued environmental protection orders (EPOs) to JMB to address end-of-life reclamation steps to be taken at JMB's gravel-producing properties on both private and public land. After the RVO, Mantle entered a transaction with Travelers Capital Corp (Travelers), pursuant to which Travelers loaned C$1.7 million to Mantle for the acquisition of equipment for its gravel operations. The Travelers' loan was secured by a first-ranking purchase-money security interest. Burdened with excessive debt and operational problems further compounded by the EPOs, Mantle ultimately commenced bankruptcy proceedings.

In the bankruptcy proceeding, Mantle requested to have certain charges approved by the Court for the bankrupt estate (collectively, the Restructuring Charges), which would have priority over all other debts, including Travelers' first ranking security. The Restructuring Charges included an interim-financing charge, and the interim financing would be "primarily" used to perform reclamation work under the EPOs. Mantle, supported by AEPA, argued that this approach was consistent with the Supreme Court of Canada's decision in *Redwater*[1] on the basis the remediation obligations are obligations of the company that must be satisfied before distributions to creditors. Travelers argued a different interpretation of *Redwater*, namely that end-of-life reclamation obligations need only be satisfied by assets related to or encumbered by those obligations.

The Alberta Court found that *Redwater* did not explicitly deal with the issue of the status of unrelated assets. In *Redwater*, all of the oil and gas assets were collectively treated as contaminated, and so the sale of all of those assets had to first be applied to the abandonment and reclamation obligations. The Alberta Court's previous decision in *Orphan Well Association v. Trident Exploration Corp.*,[2] extended the principle in *Redwater*, holding that assets of an oil and gas company — other than oil and gas rights — were not unrelated assets because the debtor had only one business: exploration and production of oil and gas. As such, proceeds from real estate and equipment were sufficiently connected to the environmental obligations to justify the super priority. Applying *Trident*, the Court here held that while the equipment was subject to Travelers' security interest, it was nonetheless part of Mantle's gravel business and therefore properly subject to a super priority in favour of Mantle's abandonment and reclamation obligations arising from that business.

The Alberta Court of Appeal denied Travelers' application for leave to appeal this decision (see **2023 ABCA 302**). Travelers has sought leave to appeal to the Supreme Court of Canada, and that **application** remains outstanding.

1 *Orphan Well Association v. Grant Thornton Ltd.*, **2019 SCC 5**.
2 *Orphan Well Association v. Trident Exploration Corp.*, **2022 ABKB 839**.

Tacora Resources Inc. (Re), 2023 ONSC 6126

In this decision, the Ontario Superior Court issued an amended and restated initial order (ARIO) that, among other things, authorized a debtor-in-possession (DIP) financing that the company required to carry out its restructuring plans.

This is a CCAA proceeding in respect of Tacora Resources Inc. (Tacora), the owner and operator of an iron ore concentrate mine located near Wabush, Newfoundland and Labrador. Tacora sought authority to borrow up to C$75 million under a DIP facility (Cargill DIP Facility) from Cargill International Trading Pte Ltd. (Cargill), a significant secured creditor of Tacora. The Cargill DIP Facility was opposed by an *ad hoc* group of noteholders, who brought their own cross-motion for court approval of a competing DIP proposal (AHG DIP Proposal). Ultimately, the Court approved the Cargill DIP Facility with reference to s. 11.2(4) of the CCAA.

In approving the Cargill DIP Facility, the Court relied on the fact that the terms of the Cargill DIP Facility and its implications were considered by Tacora's board, with the benefit of the advice and recommendations of the company's financial advisor and investment banker. The Cargill DIP Facility was determined to be the superior of the two options available to Tacora for DIP financing. Tacora and its advisors concluded that the AHG DIP Proposal had inferior terms and was less beneficial to the company from a financial and economic perspective. Each of the DIP proposals contained terms that benefited the commercial interests of the stakeholders and could reduce the company's flexibility or options in Tacora's planned solicitation process, which was accounted for in the deliberations over the two options. The Monitor also supported the approval of the Cargill DIP Facility.

In addition, the Court found that the Cargill DIP Facility, while not the preferred DIP financing option of the noteholders, did not materially prejudice their interests, nor were they treated unfairly or were their interests unduly disregarded in the DIP process that led to Tacora's acceptance of the Cargill DIP Facility. The terms of the proposed ARIO were found to be fair and reasonably necessary for the continued operations of Tacora in the ordinary course of business in order to provide stability for the company and the capital it needs to try to restructure its affairs.

Article

Can Mining Royalties in Québec be Purged by a Vesting Order Rendered in Insolvency Proceedings?

Francois Alexandre Toupin and Gabriel Faure

The Superior Court of Québec's September 11, 2023 judgment in *Re: NMX Residual Assets Inc.*[1] addressed the effect that a vesting order[2] under the *Companies' Creditors Arrangement Act* (CCAA) or the *Bankruptcy and Insolvency Act* (BIA) has on a mining royalty in Québec. The Court mentioned in *obiter* that such an order could purge a mining royalty because it has the same effect as a sale under judicial authority and purges all real rights, with the exception of those reserved in article 759 of the *Code of Civil Procedure*.

BACKGROUND AND PROCEDURAL HISTORY

In 2009, Nemaska Lithium Inc. (Nemaska) purchased mining claims in northern Québec from Mr. Victor Cantore for a consideration that included a 3% net-smelter-return royalty on all metals extracted from Nemaska's Whabouchi property (Royalty). In December 2019, as a result of liquidity issues, Nemaska obtained an initial order under the CCAA. Mr. Cantore, as a royalty holder, and other creditors, were invited to file their claims in the context of a Court-approved claims process.

In 2020, in the course of the CCAA proceedings, the Court approved the sale of Nemaska to a group of investors pursuant to a reverse vesting order transaction, while preserving Mr. Cantore's right to argue that the Royalty constitutes a real right attached to the Whabouchi property and cannot or should not be purged by the vesting order issued under the CCAA.

The Court considered Mr. Cantore's arguments and decided the following questions: (i) did Mr. Cantore obtain a real right in the Whabouchi property by virtue of the agreements pursuant to which he sold his mining claims to Nemaska or by the operation of acquisitive prescription?; (ii) did Nemaska agree in 2018 to convey a real right in the Whabouchi property to Mr. Cantore?; and (iii) if Mr. Cantore obtained a real right, was it or should it be purged pursuant to the reverse vesting order?

CAN A MINING ROYALTY IN QUÉBEC BE A REAL RIGHT?

Under Québec civil law, a right can either be qualified as a real right — *in rem*, a right in property — or as a personal right — *in personam*, a right enforceable against one or more persons. This distinction is particularly important where the grantor of the right is insolvent. Real rights, like the right of ownership, will give its holder the right to "follow the property" and enforce against a third party, while a personal right can only be enforced against the grantor. Examples of real rights include the right of ownership and its dismemberments (i.e. *usus, fructus, abusus* and other unnamed dismemberments) and hypothecs.[3] For immovable property, the concept of "real right" is akin to the common law concept of "interest in land."

Under Québec civil law, a mining royalty can be a real right. The Québec Court of Appeal held in *Anglo Pacific*[4] that the holder of a mining claim can grant a real right over the mineral substances, but the real right would only take effect when the minerals are owned by the holder (i.e., after the issuance of a mining lease and extraction of the minerals). However, in order for a mining royalty to be a real right, the constituting document must create and grant to the holder the essential characteristics of a real right, such as the conveyance of one or more of the dismemberments of the right of ownership. Further, for a mining royalty defensible against third parties, it may be necessary for its holder to publish these rights at the relevant registers.

Here, Mr. Cantore claimed to have obtained a real right to the Whabouchi property and its mineral substances either: (i) through acquisitive prescription by possessing the attributes of ownership (*animus* and *corpus*) over the property for at least 10 years prior to Nemaska's restructuring; or (ii) by virtue of the agreement pursuant to which he sold his mining claims to Nemaska.

Legally, acquisitive prescription is a mechanism by which the right of ownership transfers from the property's legal owner to an owner "*in fact*." In order to acquire ownership rights through acquisitive prescription, Mr. Cantore needed to establish that he possessed the alleged real right in a peaceful, continuous, public and unequivocal manner over a period of at least 10 years prior to the commencement of Nemaska's CCAA proceedings in December 2019. The Court concluded that it was not possible for Mr. Cantore to have acquired any rights over the mineral substances, given that the *Mining Act*[5] provides that a person may only extract subsurface mineral substances and act as the owner of a mining property after obtaining a mining lease,

1 **2023 QCCS 3710** [*Nemaska*].
2 "Vesting order" refers in this article to a traditional vesting order and a reverse vesting order. For more on reverse vesting orders, including a description of their basic characteristics, see the article from ***Mining in the Courts, Vol. XIII*** entitled "Reverse Vesting Orders: Exceptional but Still Possible" and the article from ***Mining in the Courts, Vol. XI*** entitled "Preserving Permits, Licences and Tax Attributes in Distressed M&A Transactions by Reverse Vesting Orders."
3 *Civil Code of Québec*, CQLR c. CCQ-1991, arts 911, 1119, 2660.
4 ***Anglo Pacific Group PLC v. Ernst & Young Inc***, 2013 QCCA 1323 *[Anglo Pacific]*.
5 *Mining Act*, CQLR, c M-13.1.

which lease was only granted to Nemaska in 2017.[6] Further, the Court found that there was no legal or factual support to Mr. Cantore's claim that he acquired a real right through acquisitive prescription — Mr. Cantore failed to establish a peaceful, continuous, public and unequivocal possession of an ownership right. The evidence shows that Mr. Cantore's visits to the Whabouchi property were in his capacity as an employee of Nemaska, with Nemaska's prior permission, and that Mr. Cantore never removed rock samples from the property without Nemaska's permission, and then only to show potential investors the samples.

With respect to Mr. Cantore's second argument that Nemaska undertook to register a real right in his favour, the Court found that the evidence suggested Nemaska refused Cantore's request to register a real right in his favour. The Court therefore determined that Mr. Cantore did not acquire a real right in the Whabouchi property or its mineral substances.

CAN A VESTING ORDER PURGE A MINING ROYALTY IN QUÉBEC?

As outlined above, the Québec Court of Appeal's decision in *Anglo Pacific*[7] addressed the characterization of a mining royalty under Québec civil law and whether or not it can create a real right. The Québec Court of Appeal also addressed in that case whether or not a mining royalty characterized as a real right could be purged pursuant to a vesting order. The Québec Court of Appeal held that the transaction approved by the Court constitutes, and has the same effects as, a sale under judicial authority under the *Civil Code of Québec,* such that it purges all real rights, with the exception of those reserved in article 759 of the *Code of Civil Procedure* (i.e., servitudes and emphyteusis), which do not include mining royalties. Québec's approach differs from the rest of Canada.

In Ontario, the Ontario Court of Appeal in *Dianor*[8] applied a different framework to decide whether a gross overriding royalty, intended by the parties to create an interest in and to run with the land, could be purged by a vesting order. While the Court concluded it had the jurisdiction to purge an interest in land under the BIA, it developed a two-step test to determine whether it should do so:

— first, the court must assess the nature and strength of the interest that is proposed to be extinguished on a spectrum of interests where, on one end, there are "fixed monetary interests" (akin to mortgage or a lien for municipal taxes), and, on the other end, "fee simple interests" (in substance, an ownership interest) and whether or not the interest holder consented to its right being purged; and

— second, only if the first step is not conclusive, the court may engage in a consideration of the equities, which may favour the protection of a third party's interest in land in certain circumstances.

In the instant case, although the Court decided that the Royalty was a personal right, the Court extended its analysis in *obiter* to discuss the effect of a vesting order on real rights, providing insight into the current state of the law in Québec. For the Court, *Anglo Pacific*[9] holds that a vesting order under the BIA "has the same effect as a judicial sale and purges all real rights, with the exception of those reserved in article [759] of the *Code of Civil Procedure*." Since there is no reason to distinguish a vesting order made under the CCAA from that made under the BIA, the Court determined that the effect on real rights would be the same. In its analysis, the Court referred to the warning issued by the Québec Court of Appeal in *Anglo Pacific* that "[c]ivil law is a complete system, and care must be taken not to adopt principles from foreign legal systems without questioning their compatibility with our law."[10] In light of the Court's finding that Mr. Cantore did not acquire a real right, it did not explore whether the framework set out in *Dianor* applied in Québec.

CONCLUSION

In Québec, in particular, parties must take care in drafting mining royalty agreements to ensure they reflect the true intention of the parties and, where such intention is to convey a real right, to adapt the language to avoid any ambiguity as to whether or not a real right was effectively conferred. Parties must also be aware of the legal framework applied to mining royalty agreements and that the agreement satisfies the criteria to convey a real right (i.e., requirements relating to dismemberments and registration are complied with). Until further guidance from the Québec Court of Appeal is issued on the question of whether or not a mining royalty can be purged pursuant to a vesting order, it would be prudent for parties to assume that courts in Québec may purge mining royalties in insolvency proceedings, even if they qualify as real rights.

6 *Ibid*. at ss. 3, 100, 105.
7 *Anglo Pacific*, *supra* note 4.
8 ***Third Eye Capital Corporation v. Dianor Resources Inc.***, 2018 ONCA 253 at paras 109-110 [*Dianor*].
9 *Nemaska, supra* note 1, at paras 90, 94.
10 *Anglo Pacific, supra* note 4, at para 36.

Case Law Summaries

Civil Procedure

Lindsay Burgess

Bacanora Minerals Ltd. v. Orr-Ewing (Estate), 2023 ABCA 139

In this decision, the Alberta Court of Appeal overturned the lower court's decision and held that a party's claim for declaratory relief was not statute barred by s. 3 of Alberta's *Limitations Act*.

As we reported in ***Mining in the Courts, Vol. XII***, Bacanora Minerals Ltd. (Bacanora) acquired Mineramex in 2009. Mineramex was the majority shareholder of Minera Sonora (Sonora). In 2010, Sonora and Bacanora entered into a letter of intent to acquire certain lithium claim titles in northern Mexico. Sonora, Bacanora, and Mr. Orr-Ewing then entered into a Royalty Agreement (Royalty Agreement), pursuant to which Sonora granted Mr. Orr-Ewing a gross overriding royalty amounting to 3% of the revenues derived from production of the lithium claim (Lithium Royalty). In 2016, Mr. Orr-Ewing passed away. Bacanora brought a claim against Mr. Orr-Ewing's estate (Estate) alleging that Mr. Orr-Ewing had made misrepresentations about his entitlement to the Lithium Royalty, and that his entitlement to any such royalty had ended when Bacanora acquired Mineramex. In its amended statement of claim, Bacanora sought a declaration that the Royalty Agreement was null and void or unenforceable or, alternatively, an order that it be rescinded, as well as costs and any further and other relief deemed appropriate by the Court. The Estate successfully had the claim summarily dismissed on the basis it was statute barred. Bacanora appealed.

The Court of Appeal allowed the appeal and set aside the summary dismissal of the claim. Only remedial, not

declaratory, orders are subject to s. 3 of the *Limitations Act*. The test for a declaration is as follows: once the status of the parties is determined, there is no need to return to the court for any further remedy. The Court of Appeal held that the trial judge erred in finding that the relief sought by Bacanora was not truly declaratory and was more properly characterized as a request for remedial relief. The trial judge had based his decision on a hypothetical scenario that assumed royalties had been paid and Bacanora would have to return to the court to recover the money paid. However, Bacanora would not need to obtain a remedial order forcing compliance by the Estate because no royalties had actually been paid to Mr. Orr-Ewing or the Estate. Furthermore, the request for an order of rescission did not alter the characterization of the relief sought as declaratory.

Chance Oil and Gas Limited v. Yukon (Energy, Mines and Resources), 2023 YKSC 4

In this decision, the government of Yukon (Yukon) was ordered to produce additional documents related to the imposition of a moratorium on hydraulic fracturing (Moratorium), as well as documents related to the nature and extent of benefits received by it as a result of Chance Oil and Gas Limited's (Chance) work in the area.

Chance had invested significant time and money in exploring for oil and gas in the area covered by the Moratorium. Chance claims that the Moratorium effectively expropriated its property rights without compensation, and it is seeking damages from Yukon. Yukon argues that the Moratorium was a valid exercise of its regulatory authority, and that Chance is not entitled to compensation. The parties disagreed on the list of issues Yukon must apply to its document collection in order to identify producible documents. Yukon argues that some of the issues Chance brings forward are too broad and not relevant to matters in issue between the parties in this case.

The Court ordered Yukon to disclose: (i) documents related to Yukon's motive, intent, objective or reasons for enacting the Moratorium and for carving out part of the territory from its effect (Moratorium Documents); and (ii) documents related to the nature and extent of benefits received by it as a result of Chance's work in the area (Benefits Documents).

With respect to the Moratorium Documents, Chance argued, on the basis of the SCC's decision in *Annapolis*,[1] that Yukon's intent, motive or reasons to impose the Moratorium, and its understanding of its actions,

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

are relevant to Chance's cause of action in *de facto* expropriation. Chance claims that its permits were the only ones impacted by the Moratorium and that the timing and impact of the Moratorium indicated it was implemented to prevent Chance from moving forward with a planned and announced development program. Chance pleads that Yukon has, in effect, confiscated all of its rights to extract the oil and gas resources related to its permits.

The Court agreed that records containing information regarding Yukon's motive, intent, objective, or reasons for enacting the Moratorium — and for carving out part of the territory from the effect of that Moratorium when it was implemented — may provide evidence relevant to the determination of whether there was constructive expropriation.

With respect to the Court's order for production of the Benefits Documents, Chance argued that the benefits received by Yukon as a result of Chance's work relate to matters in issue between the parties and any related documents must therefore be disclosed.

The Court found that specific benefits to Yukon were directly related to damages and relevant to matters in issue. In addition, records regarding the nature of the benefits received by Yukon as a result of the work done by Chance, as well as the extent to which Yukon knew and considered those benefits, may contain information relevant to assess Yukon's conduct with respect to the tort of negligent misrepresentation. How a particular business impacts the economy of a territory is a factor that governments may consider when decisions are made to regulate activities such as oil and gas exploration.

NWG Investments Inc. v. Fronteer Gold Inc. et al., 2023 ONSC 4826

In this decision, the Ontario Superior Court dismissed an action for inordinate delay. The action related to alleged fraudulent and negligent misrepresentations with respect to a 2007 plan of arrangement (Transaction) between two gold exploration companies, Fronteer Gold Inc. (Fronteer) and New West Gold Corp. (NewWest).

Under the Transaction, which closed on September 24, 2007, NWG Investments Inc. (NWG) exchanged its interest in NewWest for shares of Fronteer. At the time of the Transaction, Fronteer held a 40% interest in Aurora Energy Resources Inc. (Aurora). Aurora was involved in uranium exploration and development in Newfoundland and Labrador, in a region controlled by the Nunatsiavut Government Assembly (NGA). Shortly after the Transaction closed, the NGA imposed a three-year moratorium on uranium mining.

NWG commenced a C$1.2-billion claim against Fronteer and others (Defendants). NWG alleged that Fronteer's CEO at the time made specific representations that induced NWG to enter into the Transaction. NWG further alleged that Fronteer's CEO was aware of the risk that a temporary moratorium might be imposed on uranium mining and failed to disclose this fact. In order to get around an expired Ontario limitation period, NWG first commenced an action in New York in 2012. That action was dismissed by the New York Supreme Court. The

Ontario action was commenced in 2014 but was still at the pleadings stage; there had been no productions, discoveries or will-say statements, and an important witness had died. The Defendants brought a motion to dismiss the action on the basis of delay.

The Court dismissed the action, finding there had been inordinate delay, and that dismissal was necessary to prevent an unfair trial on the merits. In doing so, the Court noted that the nature of fraud claims create an obligation to move the matter forward more quickly. The delay in this case was clearly inordinate. The allegations had been outstanding since 2012, when the New York lawsuit was commenced, and there was "no end in sight," given the action was still in the pleadings stage. NWG argued that the delay was excusable on the basis that it had to change counsel and because of the existence of the COVID-19 pandemic and the illness of NWG's principal. The Court rejected these arguments and found that the delay was inexcusable. The change in counsel was not enough to excuse a delay of years, nor was the pandemic. In addition, the Defendants presented a report from a medical expert who opined that it was unlikely that NWG's principal's illness rendered him incapable of instructing counsel or making litigation decisions. Finally, NWG was unable to rebut the presumption of prejudice arising from the inordinate delay. Critically, a key witness for the Defendants had died, documentary evidence had not been preserved, and memories of the other main witnesses in the case would have faded with the passage of time.

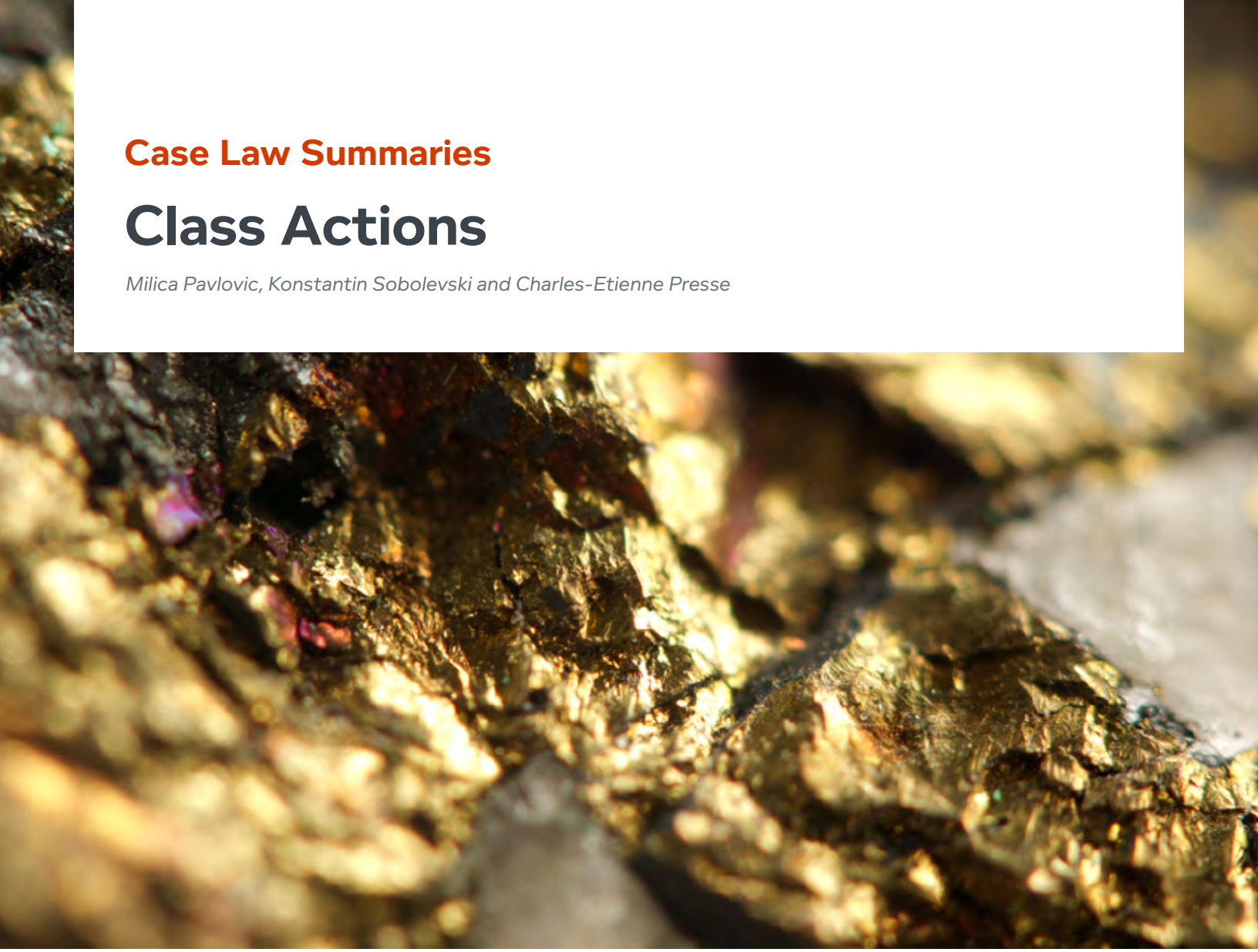
Oakley v. British Columbia, 2023 BCSC 2088

In this decision, the B.C. Supreme Court struck an amended notice of civil claim under Rule 9-5(1)(a) of the *Supreme Court Civil Rules* on the basis that it disclosed no reasonable claim. The claim related to the province's cancellation of the plaintiffs' placer claim, which they had been planning to sell.

The plaintiffs had purchased a placer claim in 2020, titled "Nellnbud," which required renewal by the province to remain valid. The plaintiffs submitted the required work report documentation to demonstrate that work was being done at Nellnbud to renew the claim, but the province rejected the claim on the basis that the report was not adequate and truthful and was thus incomplete. The province further rejected the plaintiffs' request for a time extension and did not allow further payment or grant a protection order to protect the plaintiffs' placer claim while they submitted further information for the work report.

In August 2022, the province delivered a letter to the plaintiffs stating that their placer claim was forfeited under s. 33 of the *Mineral Tenure Act*. While these facts were included in an affidavit filed in response to the province's application to strike, they were not detailed in the amended notice of civil claim at issue (ANOCC).

The Court struck the ANOCC on the basis that it disclosed no reasonable cause of action. The ANOCC failed to outline the specific legal basis for the desired relief, leaving the Defendants without a clear understanding of the case they needed to address. The pleadings were not clear enough to assert what the alleged losses and damages were or how they related to the Defendants' actions or inactions. The Court also noted that a challenge to an administrative decision like this might be more appropriately brought by way of judicial review but did not decide on this issue.



Case Law Summaries

Class Actions

Milica Pavlovic, Konstantin Sobolevski and Charles-Etienne Presse

0116064 B.C. Ltd. v. Alio Gold Inc., 2023 BCSC 1310

In this decision, the Supreme Court of British Columbia certified a multi-jurisdictional class proceeding against a gold mining company, Alio Gold Inc. (Alio), in respect of alleged misrepresentations in Alio's public disclosures. This was the second certification hearing in this case. As discussed in ***Mining in the Courts, Vol. XIII***, the first certification motion was dismissed on the basis, among other things, that the pleadings disclosed no cause of action. That decision was overturned by the Court of Appeal in **2022 BCCA 85** and remitted back to the Supreme Court for consideration of the plaintiff's reformulated proposed common issues and other matters.

The plaintiff is a former shareholder of Rye Patch Gold Corp. (Rye Patch), whose shares were sold to Alio pursuant to a court-approved plan of arrangement. Under the arrangement, Alio acquired all Rye Patch shares from Rye Patch shareholders in exchange for shares in Alio. The plaintiff alleges that Alio made false representations in two news releases and an information circular pertaining to Alio's projected gold production for 2018, which resulted in Alio's shares being overvalued and the class members not receiving fair value for their Rye Patch shares.

After the decision from the Court of Appeal, the parties attended a mediation and were able to agree on a number of issues such that the only issue for the Court at the second certification hearing was whether the reformulated common issues were certifiable. Alio argued that these reformulated common issues remained fundamentally flawed because they were either not tied to the pleadings or failed to conform to the plaintiff's theory of causation, which was the central concern of the Court of Appeal. After revising the wording of some of the proposed common issues for consistency with the plaintiff's theory of causation, the Court ultimately held that the amended common issues met the common issues criteria and, accordingly, certified the case as a class proceeding.

Lalande c. Compagnie d'arrimage de Québec ltée, 2023 QCCA 973

In this case, the Court of Appeal of Québec dismissed an appeal from the Superior Court of Québec's decision to reject a class action brought forth by residents living in the vicinity of the Port of Québec (Residents) against Québec Stevedoring Company Ltd. (*Compagnie d'Arrimage de Québec ltée*) (CAQ) and the Québec Port Authority (Port Authority).

The Residents alleged that instances of dust emissions were caused by CAQ, a company that handled and transported bulk materials at the wharfs located at the Port of Québec and managed by the Port Authority. The Residents further alleged that these emissions had caused damage and abnormal inconvenience to the group, invoking both the no-fault liability for neighbourhood disturbances and the extra-contractual civil liability under Québec laws. The Superior Court of Québec disagreed. In particular, the Court found that, although the Residents had to deal with abnormal levels of dust, given the multiple sources of dust in the area and the very low contribution of the Port's activities to those dust levels, the Residents had failed to demonstrate sufficient causation between CAQ's activities and the harm and abnormal inconveniences they allegedly suffered. The Residents appealed.

The Court of Appeal rejected the Residents' claim that dust fall experienced by members of the group was excessive due to CAQ's *significant contribution*. More specifically, the Court of Appeal determined that the Residents' claim in this regard did not meet the material contribution threshold set out in *Leonati* (i.e., that the defendant's negligence must have "materially contributed" to the occurrence of the injury" and that "[a] contributing factor is material if it falls outside the *de minimis* range").[1] Put differently, maritime transportation activities carried out by CAQ were deemed by the Court to have not materially contributed to the dust fall affecting the group members. As such, the Residents were unable to successfully prove that the alleged neighbourhood annoyances beyond the limit of tolerance were a result of CAQ's significant contribution.

While the Residents did not allege that they had suffered health issues as a result of the dust in the area, they did claim that the dust caused them to worry about and fear potential future health problems. The Court of Appeal confirmed that the burden of proof for demonstrating that such concerns constitute compensable moral injury is stringent, given the varying level of tolerance of each group member, unlike, for example, instances where group members' fears and concerns are objectively verifiable and justifiable. This decision therefore limits the Court of Appeal's earlier decision in *Spieser,*[2] which opened the door for indemnification of fears and worries, by making it clear that such fears and worries must be supported by evidence and common to the class.

For more on this decision, see McCarthy Tétrault LLP's Canadian Appeals Monitor blog post entitled **"An important reminder from the Québec Court of Appeal of the importance of causation in environmental class actions."**

1 *Athey c. Leonati,* **[1996] 3 SCR 458** at para 15.
2 *Spieser c. Procureur général du Canada,* **2020 QCCA 42**.

LeSante v. Kirk, 2023 BCCA 28

In this decision, the British Columbia Court of Appeal upheld the decision of the chambers judge re-certifying certain common issues in an environmental class proceeding.

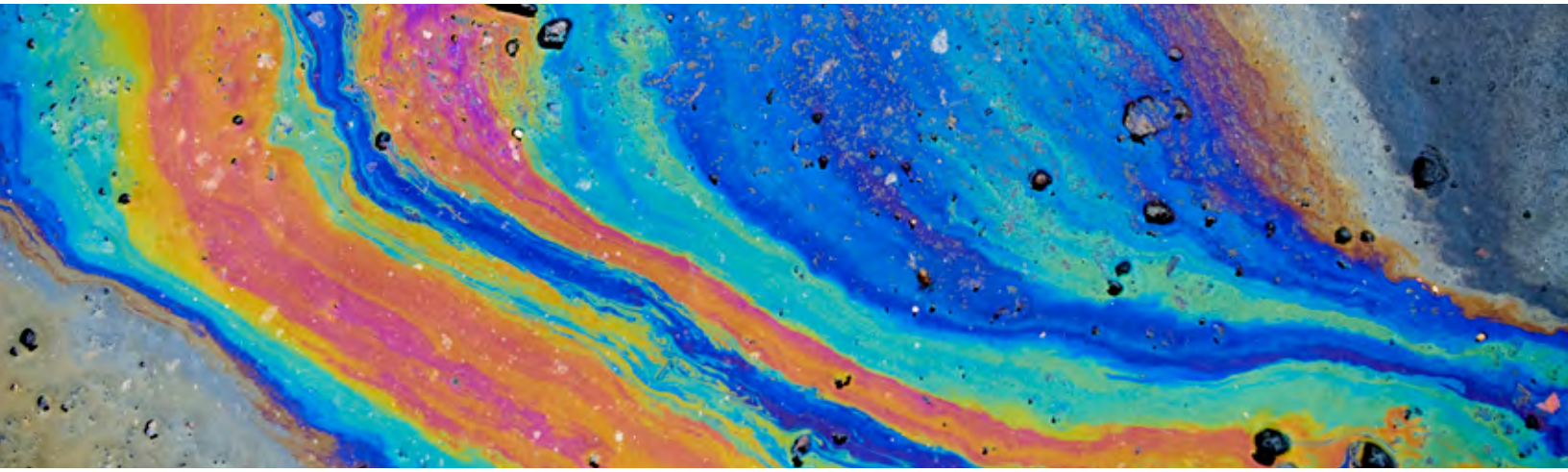
This case has a lengthy procedural history. As we reported in ***Mining in the Courts, Vol. XII***, the underlying dispute in this case relates to a fuel spill into two rivers in the Kootenay region of British Columbia that resulted in evacuation and water-use orders. The plaintiff commenced the action in 2013, seeking to certify a class action on behalf of all persons who owned, leased, rented or occupied property within the evacuation zone on the date of the spill, with claims brought in negligence, nuisance and the rule in *Rylands v. Fletcher*. The proceeding was first certified as a class action in 2017. In 2019, the Court of Appeal allowed, in part, an appeal of the certification and remitted the matter to the chambers judge for reconsideration of certain common issues. In 2021, the same chambers judge dealt with the remitted issues and recertified the action. The defendants appealed the recertification decision.

The appeal was largely in respect of the proposed nuisance claim, with the defendants arguing that the chambers judge erred in: (i) certifying common issues involving both elements of nuisance; (ii) certifying the common issue involving aggregate damages in nuisance; and (iii) concluding that a class proceeding would be the preferable procedure. The Court of Appeal disagreed and upheld the decision of the chambers judge on all three issues as follows:

1. **Elements of Nuisance:** The chambers judge did not err in including both elements of nuisance — i.e., an interference that is both substantial *and* unreasonable — in the impugned common issue. The evacuation and water advisory orders prohibited the class members' ability to use and enjoy their property. That prohibition provides "some basis in fact" of a common shared experience that could legally constitute a "substantial" interference. Similarly, there was commonality on the issue of whether the interference was unreasonable, as the form of the interference — i.e., the evacuation and water advisory orders — applied to each property and class member equally.

2. **Aggregate damages:** The chambers judge also did not err in holding that the criteria in s. 29(1) of the B.C. *Class Proceedings Act* (CPA) need only be met to *award* aggregate damages, and not to *certify* them as a common issue. If the plaintiff succeeds at proving liability in nuisance at the common issues trial, then the issue of the appropriateness and amount of aggregate damages will necessarily be common.

3. **Preferable procedure:** Finally, the chambers judge did not err in principle in concluding that a class proceeding would be the preferable procedure. Considering both of the chamber judge's certification decisions, the Court of Appeal held that he had reviewed and weighed each consideration set out in s. 4(2) of the CPA, dealing with the specific arguments that had been raised. The Court of Appeal also did not err in focusing on concerns of access to justice and judicial economy, particularly with respect to the context of this class proceeding — i.e., that of a single incident mass tort — where both of these factors are particularly salient.



Markowich v. Lundin Mining Corporation, 2023 ONCA 359

In this decision, the Ontario Court of Appeal overturned the Ontario Superior Court's decision, granted the plaintiff leave to proceed with its secondary market misrepresentation claim under the Ontario *Securities Act* against Lundin Mining Corporation (Lundin) and remitted the matter of certification as a class action back to the Superior Court.

As we reported in ***Mining in the Courts, Vol. XIII***, Lundin owns and operates an open pit copper mine in Candelaria, Chile. On or about October 25, 2017, pit wall instability was detected in a localized area of its open pit operations at the mine, and a few days later, there was a rock slide at this location. In late November 2017, Lundin issued a news release advising investors about the pit wall instability and the rock slide, after which its share price declined. The plaintiff brought a proposed class action for secondary market misrepresentation under the *Securities Act* — alleging that the pit wall instability and rock slides were "material changes" to Lundin's "business, operations or capital" that were required to be immediately disclosed and reflected in a material change report — as well as common law misrepresentation claims. The motion judge dismissed the plaintiff's motion for leave to advance the statutory claim and refused to certify the common law misrepresentation claim. With respect to the statutory claim, the motion judge found that there was no reasonable possibility on the evidence that the events constituted "changes" to Lundin's "business, operations or capital." The motion judge noted that pit wall instability is a common risk in open pit mining, and when the risks occurred here, they may have been a material fact. However, it did not constitute a change in position, course or direction of Lundin's business, which would have required immediate disclosure.

In allowing the appeal, the Court of Appeal held that the motion judge erred by adopting restrictive interpretations of the term "change in the business, operations or capital," and when applying these restrictive interpretations to the limited evidence available about the consequences of the pit wall instability and rock slide. The determination of whether there has been a material change requires the court to apply a two-step test:

— First, a consideration of whether there has been a *change* in the business, operations or capital of the issuer; and,

— Second, consideration of whether the change was material, in that it would be expected to have a significant impact on the value of the issuer's shares.

The Court of Appeal confirmed that changes external to the company will not constitute a material change absent a resulting change in the business, operations or capital of the company. The definition of "change" refers to its qualitative nature; consideration of the magnitude of the change is reserved for the second step of the test. Accordingly, what qualifies as a "change" must be looked at in reference to the terms "business, operations or capital" and in the context of the facts of the case. "Change" must also be defined broadly in the context of a leave motion under s. 138.8 of the *Securities Act*.

Here, had the proper legal test been applied, the available evidence should have led the Superior Court to conclude there would be a reasonable possibility the plaintiff could demonstrate that the pit wall instability and rock slide constituted a change in Lundin's operations. Namely, there was some evidence that the mining operation was closed for a period of time. As well, there was uncontested evidence that, as a result of the rock slide, Lundin had to modify its schedule for the phased mining of the open pit, its expected production for 2019 decreased, and it needed to make up for this reduced production with lower grade ore for 2019.

Lundin filed an **application** for leave to appeal this decision to the Supreme Court of Canada and the decision on leave is pending.

Case Law Summaries

Contracts

Diana Wang

Baffinland Iron Mines LP et al. v. Tower-EBC G.P./S.E.N.C., 2023 ONCA 245

In this decision, the Ontario Court of Appeal held that Baffinland Iron Mines LP and Baffinland Iron Mines Corporation (Baffinland) could not seek leave to appeal an arbitration award under s. 45(1) of Ontario's *Arbitration Act* because the phrase "finally settled" in the parties' arbitration agreement (Arbitration Agreement) meant the same thing as "final and binding" used in a separate dispute resolution provision in the contracts, and, in both cases, the parties intended to preclude appeal rights. In doing so, the Court of Appeal clarified the application of the presumption of consistent expression in contractual interpretation (Presumption) after the Supreme Court of Canada's decision in *Sattva*.[1]

Baffinland had two contracts (Contracts) with Tower-EBC G.P./S.E.N.C. (Tower) pursuant to which Tower was to provide earthworks services in relation to Baffinland's construction of a rail line from its mine to a nearby port. Baffinland terminated the Contracts in 2018 as a result of delays. Tower commenced an arbitration challenging the termination and seeking damages. The arbitration

1 *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53.

tribunal held that Baffinland wrongfully terminated the Contracts and awarded Tower C$70 million (Award). The Ontario Superior Court denied Baffinland's application for leave to appeal based on errors of law, finding that the Arbitration Agreement precluded appeals on questions of law. The Arbitration Agreement referred to disputes being "finally settled" by arbitration and incorporated Article 35(6) of the International Chamber of Commerce Rules, which binds parties to their arbitral award and denies them any form of recourse. However, other provisions of the Contracts related to settlement by a Dispute Adjudication Board used the phrase "final and binding," which has been recognized by Ontario courts to preclude arbitral appeals. Baffinland argued that the use of "final and binding" elsewhere in the Contracts meant that the parties intended the phrase "finally settled" in the Arbitration Agreement to have a different, non-final interpretation; however, the Court rejected that position.

The Court of Appeal upheld the Superior Court's decision and rejected Baffinland's argument that the application judge failed to apply the Presumption, which provides that language is used in a contract consistently, with the same words meaning the same thing and different words evincing different things. The Court of Appeal started with the principle from *Sattva* that contractual interpretation must be approached in a practical, common-sense way and not dominated by rules of construction. Recognizing that the Presumption may sometimes help determine the parties' intention, the Court of Appeal cautioned against treating the Presumption as a "dominating technical rule of construction that overwhelms [an interpretation] based on ordinary and grammatical meaning of the text." Instead, the Presumption does not bar using "differently worded but mutually reinforcing phrases" that have the same meaning, such as when a contract drafter may use multiple expressions meaning the same thing for clarification. It applied the Presumption to find that the ordinary and grammatical meaning of "finally settled" in the context of the Arbitration Agreement had the same meaning as "final and binding," and the parties therefore intended to preclude appeal rights following an arbitration. The Presumption favoured "a consistent meaning to the repeated word 'final' (or 'finally') when it was used with 'binding' and when it was used with 'settled.'"

For more on this decision, see McCarthy Tétrault LLP's Canadian Appeals Monitor blog post entitled **"The Ontario Court of Appeal Considers The Presumption of Consistent Expression in Contractual Interpretation"** and International Arbitration blog post entitled **"Appealing an Arbitral Award – Are we "Finally Settled"?"**

Boliden Mineral AB v. FQM Kevitsa Sweden Holdings AB, 2023 ONCA 105

Here, the Ontario Court of Appeal upheld the Ontario Superior Court's decision that First Quantum Minerals Ltd. (First Quantum) was liable under a share purchase agreement (the Agreement) to indemnify Boliden Mineral AB (Boliden) for both pre- and post-closing tax liabilities on the basis that First Quantum breached representations and warranties in the Agreement.

First Quantum sold its shares in Boliden Kevitsa Mining Oy (Kevitsa), a Finnish company, to Boliden in June 2016. The Agreement contained two indemnities: (i) a general indemnity for losses incurred as a result of First Quantum's breach of a representation or warranty; and (ii) a free-standing, tax-specific indemnity. In 2018, the Finnish Tax Administration (FTA) reassessed Kevitsa (the Reassessment) in respect of a 2010 reorganization that it concluded was an inappropriate tax avoidance measure, and it disallowed substantial deductions for interest expense and exchange rate losses. As a result, Kevitsa became liable for substantial taxes, penalties and interest. It used its pre-closing accumulated tax losses to offset these amounts (as opposed to applying the losses to its post-closing income), which resulted in it incurring additional tax liabilities post-closing than it otherwise would have. First Quantum assumed defence of the Reassessment and pursued many appeals (one of which remains outstanding) but did not indemnify Boliden for its losses resulting from the Reassessment. Boliden sought declaratory relief from the Ontario Superior Court that First Quantum was liable to indemnify it for all losses arising from the Reassessment. First Quantum conceded that it was liable for reassessed taxes paid or payable pre-closing as a result of the tax-specific indemnity.

As we reported in ***Mining in the Courts, Vol. XII***, the Ontario Superior Court found First Quantum liable for both pre- and post-closing taxes under both indemnities. First Quantum breached a representation and warranty in the Agreement that "there are no grounds for the reassessment" of Kevitsa's taxes. Unlike other representations and warranties in the Agreement, this one was not knowledge qualified. As it was incorrect, a breach was made out and the general indemnity, which was not restricted to pre-closing tax periods, was triggered. In addition, although the post-closing period losses were consequential or indirect losses, the Court found that they were subject to the indemnity because they were reasonably foreseeable within the provisions of the Agreement. Finally, the Court found that the post-closing period taxes were captured by the tax-specific indemnity because they were "causally linked" to the Reassessment of the pre-closing tax period. First Quantum appealed.

The Court of Appeal dismissed First Quantum's appeal. It rejected First Quantum's argument that the grounds for reassessment only came into existence after closing as a result of a novel interpretation of Finnish tax law. Rather, the case was about the legality of the transaction under the general anti-avoidance provision of the tax legislation, not about a retroactive interpretation or change in the legislation. In addition, and contrary to First Quantum's argument, the application judge did not treat the representation and warranty as warranting there could never be a reassessment because the application judge found that grounds for a reassessment existed at the time of closing.

The Court of Appeal also held that the application judge's use of the common law concept of reasonable foreseeability to determine that First Quantum was liable for post-closing taxes was reasonable. In this regard: (i) the contracting parties were sophisticated and chose Ontario law, which the application judge applied, to govern the Agreement; (ii) the breach of the representation and warranty was the event or circumstance giving rise to the indemnity, so the question was not whether the breach was likely, but whether losses flowing from that breach, if it occurred, were reasonably foreseeable; and (iii) the application judge expressly considered, and found on the evidence, that it was reasonably foreseeable that Kevitsa would be able to use pre-closing accumulated tax losses to offset its post-closing income.

Kinross Gold Corporation et al. v. Cyanco Company, LLC, 2023 ONSC 4058

In this decision, the Ontario Superior Court of Justice interpreted a contract for the purchase and sale of sodium cyanide (Agreement) between Kinross Gold Corporation and its mining operator subsidiaries (Kinross) and Cyanco Company, LLC (Cyanco), a producer and supplier of sodium cyanide. The Court found that the Agreement was not confined to the supply of liquid sodium cyanide, and, therefore, Kinross was precluded from purchasing solid sodium cyanide from other suppliers for use at certain of its mines.

In 2017, Kinross entered into the Agreement for the supply of liquid sodium cyanide to be used at two of its gold mines in Nevada in the United States (Mines). Under the Agreement, Cyanco must sell and deliver the products described in the specific purchase conditions (SPCs) during the contract term to the subsidiary operators of the Mines as the "Buyers." The SPCs defined "Product" as "liquid sodium cyanide," which was described as "Sodium Cyanide 30% (nominal) Aqueous Solution." The SPCs further stated that Cyanco was Kinross's sole supplier of liquid sodium cyanide for the Mines under the Agreement, and that Kinross could not "separately contract supply which would be in conflict with this concept" without Cyanco's prior written consent. In 2020, Kinross issued a request for proposal (RFP) for the supply of solid sodium cyanide to most of its mine sites, including the Mines. Cyanco took the position that Kinross would be in breach of the Agreement if it proceeded with the RFP. Kinross then sought a declaration from the Court that the Agreement was limited to liquid sodium cyanide and did not preclude it from purchasing solid sodium cyanide from a different supplier and dissolving it into liquid form for use at the Mines.

The Court found in favour of Cyanco. It rejected Kinross's argument that the defined term "Product" had the same meaning as "liquid sodium cyanide." It held that the Agreement and the SPCs specified the "Product" to be liquid sodium cyanide in a "30% (nominal) Aqueous Solution." The court ruled that the words "liquid sodium cyanide," given their ordinary and grammatical meaning, meant sodium cyanide in solution, which would include sodium cyanide in solution at other concentrations. Applying the wording of the SPCs, the Court held that the Agreement requires Kinross to purchase the Products solely from Cyanco so long as the Mines are operating and require liquid sodium cyanide for their operations. The other provisions of the Agreement and SPCs and the surrounding circumstances — the nature of liquid and solid sodium cyanide, and the terms of another contract between the parties made at the same time as the Agreement — supported this conclusion.

Orogenic Gold Corp. v. Mill, 2023 BCSC 832

In this summary trial application decision, the Supreme Court of British Columbia ordered specific performance in favour of Orogenic Gold Corp. (Orogenic) of an option agreement (Agreement) related to the transfer of four mineral tenure claims (Mineral Claims) against its former president, CEO, and director, Richard Mill (Mill).

Mill incorporated Orogenic in 2017 to hold the Mineral Claims with plans of taking the company public. In 2018, under the terms of the Agreement, Mill granted Orogenic the option to acquire 100% right, title and interest in the Mineral Claims in exchange for a smelter royalty, payments and Orogenic's common shares. Orogenic agreed to maintain and pay for all expenses related to the Mineral Claims. The Agreement would terminate, and the Mineral Claims would revert back to Mill if Orogenic did not complete a going public transaction within five years of the date of the Agreement, or it failed to make certain share disbursements up until a going public transaction.

Mill did not deliver transfers of the Mineral Claims to Orogenic upon execution as required by the Agreement. Instead, from 2019 to 2021, Mill entered into option agreements with various resource companies on behalf of himself personally, represented that he owned the mineral claims and invoiced Orogenic for work done in relation to mineral claims not covered by the Agreement. In November 2021, Orogenic's chief financial officer discovered that Mill did not transfer the Mineral Claims. Subsequently, Orogenic demanded that Mill transfer the Mineral Claims, elected new directors, removed him from the company and commenced legal action.

The Supreme Court of B.C. awarded specific performance after first finding that: (i) the issues in question were suitable for summary trial; (ii) Orogenic did not waive Mill's obligation to transfer the Mineral Claims in accordance with the Agreement; (iii) Orogenic's claim was not barred by B.C.'s *Limitation Act*; and (iv) Mill breached his obligation to transfer the Mineral Claims pursuant to the Agreement. In its analysis on the issue of specific performance, the Court found that: (i) the Mineral Claims were subjectively unique and foundational to Orogenic because they represent the right to access minerals in specific places; (ii) Orogenic was created to acquire them and be publicly listed; and, (iii) the public offering was intended to be based on the right to exploit them. The Court also found that the Mineral Claims were objectively unique on the basis that Mill had acquired them by diligently reviewing the B.C. mineral title system, he recognized their potential for valuable metals from previous mining operations, and the value of the Mineral Claims was unknown and not easily ascertained without extensive work.

The Court also rejected Mill's argument that specific performance was unavailable because Orogenic was not ready, willing and able to complete the Agreement as it had not made required payments under the Agreement or completed a going public transaction. The Court found that the deadline for the going public transaction had not yet passed and, in any event, Mill's failure to transfer the Mineral Claims contributed to Orogenic's inability to pursue a public offering. In addition to awarding specific performance to Orogenic, the Court extended Orogenic's deadline for completion of the going public transaction. Mill filed an appeal to the B.C. Court of Appeal on June 15, 2023.

Peace River Partnership v. Cardero Coal Ltd., 2023 BCCA 351

Here, the British Columbia Court of Appeal upheld the lower court's decision regarding the parties' rights relating to a coal mining project in northern British Columbia (Project), specifically that: (i) Carbon Creek Partnership (CCP) breached its joint venture agreement (JVA) with Cardero Coal Ltd. (Cardero); (ii) Cardero did not breach the JVA; and (iii) Cardero's written notice to surrender lands under a coal lease (Lease) with Peace River Partnership (PRP) was effective.

We reported on the lower court's decision in ***Mining in the Courts, Vol. XIII***. Under the JVA, Cardero agreed to assume 100% of the costs of exploration, development, mining and marketing of the Project in exchange for a 75% interest in the Project, and it had the option to abandon any of the Project coal tenures upon giving notice (Abandonment Clause). Cardero entered into the Lease with PRP and exercised the associated option, which granted Cardero an exclusive right to mine a freehold parcel (Freehold) for C$6 million and a 5% royalty on production. Under the Lease, Cardero had the right to surrender the leased lands by giving 60 days' prior written notice (Surrender Clause). PRP could also terminate the Lease if Cardero failed to obtain the necessary permits and approvals by June 15, 2013 (Permitting Deadline) or failed to begin production by June 15, 2017 (Production Deadline).

Cardero could not meet the Permitting Deadline and the parties amended the Lease to replace it with an obligation for Cardero to pay advance royalties in instalments. However, Cardero failed to pay the advance royalties and could not meet or obtain an extension of the Production Deadline. In April 2014, Cardero issued a notice of surrender effective May 30, 2014 under the Lease, and a notice of abandonment under the Abandonment Clause. It continued to maintain the joint venture's remaining coal ventures, but CCP advised it would not co-operate in the joint venture until Cardero paid the advance royalties. The parties served notices of default on each other. Cardero then commenced an action claiming CCP breached the JVA for non-co-operation (JVA Action) and CCP counterclaimed that Cardero breached the JVA by abandoning the Freehold, contrary to its obligation to maintain properties in trust for the joint venture (Trust Clause). PRP commenced a separate action claiming Cardero breached the Lease by failing to pay the advance royalties (Lease Action).

The two actions were heard together. In the JVA Action, the lower court held that CCP breached the JVA by failing to co-operate. The lower court dismissed CCP's counterclaim, holding that Cardero was entitled to abandon the Freehold using the Abandonment Clause. In the Lease Action, the lower court found that Cardero's surrender notice was effective under the Lease, but it breached the Lease by failing to pay the advance royalties that had accrued. CCP appealed the decision in the JVA Action, and PRP appealed the decision in the Lease Action. Cardero cross-appealed the lower court's award on costs in both actions.

The Court of Appeal upheld the lower court's decision. In the JVA Action, the Court of Appeal held that the lower court did not err in interpreting the agreements in a way that permitted Cardero to abandon the Freehold without triggering a breach of the Trust Clause; on the contrary, the lower court considered the plain and ordinary meaning of the agreements and found that the surrounding circumstances that CCP relied on would have overwhelmed the clear language of the contracts and been inconsistent with the wording of the agreements. The lower court also did not err in interpreting the JVA to find that CCP's lack of co-operation constituted a breach of the JVA and Cardero provided adequate notice of default of such breach. In the Lease Action, the Court of Appeal held that the lower court did not err in finding that Cardero's notice of surrender was effective. While the lower court's conclusions on this point were stated in cursory form, reading its decision generously, it must be taken to have concluded that Cardero's notice of surrender was clear, unambiguous and unconditional.

The Court of Appeal allowed, in part, Cardero's cross-appeal that the lower court erred in awarding PRP its costs on a contractual indemnity basis in the Lease Action. The Court held that the lower court erred in holding that it could not consider Cardero's settlement offer despite finding that it ought reasonably to have been accepted by PRP because settlement offers were not contemplated in the costs indemnity clause in the Lease. The Court of Appeal found "recovery of full indemnity costs" would be "unfair and inequitable" given the parties' relative success and Cardero's settlement offer in the Lease Action.

Article

More Than an Emoji, but Less Than a Signed Contract — Ontario Court Enforces Disputed Mining Royalty Purchase and Sale Agreement

Andrew Kalamut, Kyle McMillan and Sarah Xu

OVERVIEW

A recent (and ongoing) case before the Ontario Superior Court of Justice and the Ontario Court of Appeal illustrates the hazards that can befall parties in the midst of commercial negotiations.

Binding and enforceable agreements can be formed in the absence of signatures on the execution version of a contract. Parties should be cautious about the language used in meetings and email exchanges during the course of negotiations.

In *Lithium Royalty Corporation v. Orion Resource Partners*,[1] the Court found that the parties to a negotiation involving an overriding gross royalty interest in a Nevada lithium mine (Royalty) had agreed to the essential terms of the deal, and thus formed a binding contract, despite the lack of an executed term sheet. The Court also found that certain entities, over which it would not otherwise have any jurisdiction, had voluntarily attorned to its jurisdiction by making fulsome submissions without raising the issue of jurisdiction. The trial of this matter proceeded only on liability, with the remedy trial deferred to a later date.

The Orion defendants appealed that decision.

Around the same time, Lithium Royalty Corporation brought a motion against the Orion defendants to preserve the Royalty and other assets pending the remedy trial.

The Orion defendants sought to stay both the preservation motion and remedy trial pending its appeal on the liability decision. However, the Court of Appeal[2] allowed only a partial stay of proceedings and enforcement as against two of the respondent entities, and it declined to stay the entire underlying action pending appeal. Instead, the appeal was stayed pending the completion of the underlying proceedings.

BACKGROUND FACTS

The Thacker Pass mine in Nevada is one of the world's largest lithium mining projects. Being an essential component in batteries, lithium is quickly becoming a key global resource commodity.

Orion Resource Partners and related entities (collectively, Orion) had previously launched two bidding processes to sell a royalty interest in Thacker Pass in 2019 and 2020. Both processes ultimately terminated with no successful bid, though Lithium Royalty Corporation (LRC) bid both times.

Orion and LRC again entered negotiations in January 2021, when LRC offered US$20 million for 100% of the Royalty. Negotiations culminated with a video conference on January 20, 2021. The contents of this discussion were disputed by LRC and Orion.

Following this video conference, LRC's president sent an email to Orion's representative, stating:

> We accept your offer of USD$18.7m in cash for 85% of the Thacker Pass royalty held by Orion. On closing, the 85% and 15% portion of the royalties shall be divided into two separate royalties with any repayment split accordingly. Binding term sheet to follow.

Orion's representative replied via email, "OK, sounds good."

A term sheet was sent to Orion by LRC for comment, which was marked up and returned by Orion.

A few days later, a third-party company, Trident Royalties PLC (Trident), made an unsolicited offer for the Royalty. Orion informed LRC of this and the fact that it was considering the unsolicited proposal. LRC replied that it considered their agreement binding and enforceable.

Two days later, LRC returned the term sheet that Orion had revised, but Orion did not sign it. Instead, Orion entered a deal with Trident, selling a 60% interest in the Royalty.

PROCEDURAL HISTORY

LRC commenced an application in the Ontario Superior Court of Justice seeking a declaration that an enforceable contract existed between it and Orion Resource Partners and specific performance of the transfer of an 85% interest in the Royalty.

The Jurisdiction Motion

Before the matter proceeded to trial, LRC sought to add Trident as a respondent to the proceeding because Trident had acquired an interest in the Royalty that infringed upon the 85% interest that LRC claimed.[3]

1 **2023 ONSC 4664** *(Lithium Trial).*
2 *Lithium Royalty Corporation v. Orion Resource Partners,* **2023 ONCA 697**.
3 *Lithium Royalty Corp. v. Orion Resource Partners et al.*, **2021 ONSC 7686.**

Trident resisted being added, arguing that the Ontario Court had no jurisdiction over it or the contract between Orion and Trident for the sale of the 60% interest in the Royalty.

In order to find jurisdiction over Trident, LRC needed "to show that it has a good arguable case for the assumption of jurisdiction, or that its case has 'some chance of success.'"

The Court considered the four presumptive connecting factors for a claim in tort, as set out in *Club Resorts Ltd. v. Van Breda*,[4] any of which create a (rebuttable) presumption of jurisdiction:

— the defendant is domiciled or resident in the province;

— the defendant carries on business in the province;

— the tort was committed in the province; or

— a contract connected with the dispute was made in the province.

Ultimately, the Court concluded that: (i) none of the four *Van Breda* factors applied; (ii) the factors that were argued did not meet the standards established in *Van Breda*; and (iii) no submissions were made on establishing a new presumptive connecting factor.

The Court considered, but rejected, an argument that the underlying contract was made in Ontario because the critical email correspondence was exchanged through a server in Toronto.

The Liability Trial

LRC's application was converted to an action and the parties agreed to bifurcate the issue of liability and remedies. The liability trial proceeded in December 2022.

A number of procedural and substantive issues were addressed at the trial:

LRC's Motion to add Other Orion Entities to Correct a Misnomer

At the outset of the trial, LRC applied for leave of the Court to add additional defendants within the Orion group, which were the actual holders of the Royalty and the entities that held the shares of those holding companies. This is because the initial defendant named by LRC in the proceeding was simply a business name and not a legal entity.

The proposed Orion defendants resisted the motion on the basis that LRC knew, or ought to have reasonably known, which entities held and controlled the Royalty.

The Court nevertheless granted LRC leave to correct the misnomer, finding that it was reasonable for LRC to have named Orion as the respondent and not have discovered that the Royalty was held by companies under Orion until after commencing litigation. The Court was satisfied that LRC had satisfied the so-called "finger litigating" test — it intended to name the companies, and the companies knew they were the intended defendants.

Whether the Court had Jurisdiction Over the Orion Defendants

Orion also argued that the Ontario Court lacked jurisdiction over it, and that the only entity that had attorned to the Court's jurisdiction was Orion Resource Partners (the non-legal entity) and not the newly named defendants.

The Court rejected this argument, finding that although it lacked jurisdiction *simpliciter* over the Orion entities (for similar reasons as it lacked jurisdiction over Trident), the relevant Orion entities had voluntarily attorned to the jurisdiction of the Court:

> The affidavit evidence submitted by [Orion Resource Partners] entirely applied to the position of the proposed Orion respondents. It is obvious that despite being a non-suable entity, instructions were being provided by a competent entity to fully defend this matter on the merits of whether or not a contract was validly formed and is enforceable. There is no suggestion that the proposed Orion respondents would have defended differently or provided different evidence than what was before this court. It appears that the proposed Orion respondents, as the holders of the Royalty at the time of this impugned transaction, made a tactical decision to see whether they could have this matter disposed of, in their favour, by this court.

Was There a Valid and Enforceable Contract?

The main factual disagreement as to whether an enforceable contract was formed between Orion and LRC related to:

— whether Orion made a counter-offer to LRC during the January 20, 2021 video conference;

4 2012 SCC 17.

— whether Orion's portfolio manager stated that he had the authority to make this binding counter-offer to LRC; and

— what the essential terms of the alleged contract were.

LRC claimed that following the January 20, 2021 video conference, there was a mutual intention between the parties to enter a binding agreement, and the essential terms were agreed upon.

Orion took the position that: (i) LRC misconstrued Orion's intentions amid ongoing discussions; (ii) the parties never agreed on the essential terms; and (iii) in any event, a comprehensive signed contract is an essential term of any royalty agreement, as per customary industry practice.

Considering the surrounding circumstances and the testimony of individual witnesses, the Court found that a binding and enforceable contract was formed. LRC's email sent after the January 20, 2021 video conference contained the essential terms of the deal, which were settled on that call, namely, price, the asset being traded (the Royalty), the percentage of the Royalty being acquired, the form of consideration, the lack of requirement for due diligence and LRC's waiver of conditions.

The fact the initial term sheet that was circulated contained conditions and other clauses counter to the deal the Court found was reached was not prohibitive because the essential terms were correctly stated, and "the balance of the terms were essentially boilerplate terms."[5] Likewise, a clause in the term sheet stipulating that the underlying agreement would become effective upon delivery of Orion's signed copy was given little weight as it was a standard contractual term inserted by counsel and not reviewed by LRC's representative in the haste of completing the deal. The time-sensitive nature of the deal was a significant factor. Notably, Orion's fund holding the Royalty was nearing maturity, and there were two prior failed bids that predated the 2021 negotiations. These were external motivating factors for Orion to sell the Royalty interest in a timely manner. The speed of the transaction and resulting lack of formalized terms were found to be understandable from a commercial efficacy perspective given the circumstances. The Court reviewed conflicting expert evidence on customary practices in the sale of royalty interests but found that evidence to be of little assistance in resolving the issue.

The fact that Orion ultimately did not sign the term sheet was inconsequential because the essential terms were concluded in the prior email from LRC accepting Orion's offer and evidenced by Orion's response confirming LRC's acceptance. The binding term sheet was revised by Orion and accepted by LRC, without change or conditions, demonstrating a meeting of the minds not only on the essential terms but the standard non-essential terms as well. The comprehensive written agreement and related transactional documents were to follow, but their execution was not itself part of the essential terms of the contract.

Finally, the Court considered whether the contract was actually enforceable under Nevada's *Statute of Frauds*, given the signature requirements raised by that law. This was complicated by the fact that it is an open question as to whether mineral royalties are real property interests under Nevada law (and thus whether the *Statute of Frauds* applies at all). The Court considered expert opinions tendered by each party, but it concluded that mineral royalties would probably be considered personal property interests, or alternatively, if they are real property interests, that the electronic signatures found in the emails exchanged between the parties were adequate to confirm the contract.

The Stay of Appeal Motion

Following the liability decision (but prior to the commencement of the remedies hearing), Orion brought a motion for a stay of the proceedings pending its appeal of the liability decision (specifically on: (i) the finding that certain Orion entities attorned to the jurisdiction of the Court; (ii) the trial court permitting LRC's amendment motion to amend the defendant parties; (iii) the granting of a judgment in vague terms; and (iv) the finding that there was a contract without clarifying essential terms or which entities comprised the Orion group). The Court of Appeal granted a partial stay of proceedings, which permitted the action to continue but prevented enforcement of the action against two of the Orion entities.[6]

The determination to grant a stay was informed by the consideration of three non-exhaustive factors adapted from *RJR-MacDonald*:[7] (i) whether there was a serious question to be tried; (ii) whether the moving party would suffer non-compensable harm if the stay was not granted; and (iii) the balance of convenience. The Court of Appeal

5 *Lithium Trial* at para. 216.
6 *Lithium Royalty Corporation v. Orion Resource Partners*, **2023 ONCA 697**.
7 *RJR-MacDonald Inc. v. Canada (Attorney General)*, **1994 CanLII 117 (SCC)**.

was satisfied that some of the grounds of appeal were not frivolous or vexatious, and, therefore, there was a serious question to be tried. The Court placed significant weight on this factor with respect to the attornment of two of the Orion entities, given that the trial decision did not address issues of corporate separateness or lifting the corporate veil. It was this consideration that outweighed the other factors with respect to these two entities and persuaded the Court that a partial stay should be awarded but only for these two entities.

The Court did not accept that Orion would suffer irreparable harm without the stay. Orion argued that if the proceedings were not stayed, then any step it or its related entities take in these proceedings beyond challenging jurisdiction could constitute attornment, thereby rendering its attornment ground of appeal moot. However, that risk was diminished by LRC's undertaking not to rely on participation in the remedies phase as a further act of attornment, the trial judge having already determined that the Orion respondents had attorned in the trial decision, and the grounds of appeal for that finding not being especially strong.

The Court also found that the balance of convenience strongly favoured rejecting the motion for a stay of proceedings because there was evidence that Orion was dissipating the Royalty interests related to the contract in the proceedings.

The Preservation Motion

After the release of the decision in the liability trial, LRC sought an injunction to prevent Orion from dissipating the Royalty to ensure that it was available for judgment (unpublished decision of Justice Chalmers, dated January 3, 2024). The Court applied the same three-part *RJR-Macdonald* test for an interlocutory injunction and was satisfied that the three factors were met. In light of the previous findings that there was a binding contract between LRC and Orion, and that Orion had attempted to sell the Royalty while the litigation was ongoing, the Court found that there was a serious issue. The court also found that LRC would be irreparably harmed if the Royalty were sold or otherwise put out of reach pending the resolution of the proceeding. Finally, the balance of convenience favoured LRC, as there would be little harm to Orion if the injunction were granted.

Ultimately, the injunction was granted against Orion, with the exception of the two corporate entities under the Orion umbrella for which proceedings were stayed by the Court of Appeal.

WHY THIS CASE MATTERS

The decisions that have come out of this ongoing proceeding have addressed numerous issues that arise in contractual disputes between international parties: namely jurisdiction disputes and corporate identities.

The trial decision reinforces the principles of contract formation as they are applied to the increasingly digitized business world. Companies negotiating such contracts should be mindful of statements made in such negotiations (and in follow up email correspondence). This is especially true when transactions are being negotiated under tight time constraints (as they often are). Perhaps akin to a "thumbs-up emoji,"[8] the Court was prepared to accept an email of "OK, sounds good" as binding acceptance of material terms.

This case also serves as an important reminder that a final signed set of contractual documents may not be necessary for an enforceable contract, and that seemingly inconsistent terms arising within a negotiation may be given little weight if they are found to be mere boilerplate or otherwise non-essential. It will be a highly fact-specific analysis in each case, and parties are wise to have their legal counsel involved in such negotiations.

Parties should also seek legal advice on attornment when litigation (or the prospect of litigation) is on the horizon among parties in different jurisdictions, as this is an area where it is easy to make a misstep that can be difficult to correct.

Still to come is the determination of remedies, which will raise interesting questions over the appropriate remedy where specific performance of a royalty was sought, but where that interest has, at least in part, been sold to a third party that the Court has no jurisdiction over.

8 *South West Terminal Ltd. v. Achter Land*, **2023 SKKB 116**.

Case Law Summaries

Criminal Law

Lindsay Burgess and Rachael Carlson

R. v. Mossman and Meckert, 2023 BCPC 157

In this decision, the B.C. Provincial Court, following a retrial, convicted Mr. Mossman — who was the president, CEO and director of mining company Banks Island Gold Ltd. (BIG) — on 13 counts for offences related to discharging regulated substances in excess of permitted amounts contrary to the *Environmental Management Act* (EMA) and in excess of authorized limits under the *Metal Mine Effluent Regulations* (MMER), contrary to the federal *Fisheries Act*. Mr. Mossman's co-defendant, Mr. Meckert, was found not guilty on all counts.

BIG is engaged in the business of acquiring, developing and operating mineral properties, including the Yellow Giant Mine (Mine) on Banks Island, B.C. At the time of the

alleged offences, Mr. Mossman was the designated mine manager for the Mine under the *Mines Act*. Mr. Meckert was employed by BIG and was the Mine's chief geologist. The Court found that Mr. Mossman was the key operating mind of BIG. However, it was unable to come to the same conclusion with respect to Mr. Meckert.

Mr. Mossman was ultimately convicted according to the secondary liability provisions of the EMA and *Fisheries Act* in his role as the president of BIG and mine manager on the basis of having participated or acquiesced in the commission of the offences by the corporation. Such provisions generally provide that directors, officers, and agents who direct, permit, authorize or acquiesce in the commission of an offence by a corporation are liable on conviction regardless of whether the corporation has been prosecuted (*Fisheries Act*) or convicted (EMA). The Court commented that the purpose behind the expansion of liability for corporate regulatory offences to directors and officers is to "bring pressure to bear on those persons who are a corporation's directing or operating mind or its delegated agent." Such persons have the power and authority to ensure that reasonable steps are taken by the company, such as incorporating effective systems to prevent the commission of an offence.

Notably, neither BIG nor Mr. Mossman presented any evidence of due diligence. Mr. Mossman's conviction was based on the following findings of fact:

- As the president and CEO of BIG, Mr. Mossman had a significant role in leading BIG (an entity with approximately 100 employees, with 30-40 of them working at the Banks Island mine where the contravention occurred).
- Mr. Mossman was "unquestionably the key operating mind of BIG on the ground at the Yellow Giant Mine Site." He submitted applications for permits; the inspectors viewed him as the "boss" at the mine; he was the primary contact for the regulators; he ran the day-to-day operations; he had final decision-making authority in all matters; and he was the designated mine manager under the *Mines Act*, and therefore an agent for the mine.
- Mr. Mossman was the person who could control what BIG did and did not do. His decisions were BIG's decisions. Where BIG acted, failed to act or was wilfully blind to the environmental risks, Mr. Mossman was the final decision maker. He directed, authorized, assented or consented to the actions or lack of action of BIG and its employees.
- Mr. Mossman was responsible for ensuring compliance with permits and seeing that environmental monitoring was completed as required.
- A systemic failure resulted in various exceedances in the water samples. BIG should have had a foolproof system, and regardless of which BIG department was responsible for the testing, Mr. Mossman was the ultimate person responsible. The failure to have a foolproof system in place led to the exceedances. To quote an old adage, "The buck stops at the top."
- Mr. Mossman failed to have a system in place to ensure testing was completed as required. BIG failed to pay the laboratory, and the test results were not provided, resulting in the contravention. It was irrelevant if someone other than Mr. Mossman was at fault for the lab not being paid.

In a separate decision (*R. v. Mossman* **2023 BCPC 229**), the Court denied Mr. Mossman's application for a judicial stay of proceedings on a portion of the counts under the *Kienapple* principle, which provides that convictions cannot be registered on charges that are factually and legally the same. In denying the application, the Court noted that the offences were under different statutes created by different legislative bodies with different purposes and legal elements. As such, there was no legal or factual nexus between the offences Mr. Mossman was found guilty of, and the facts did not overlap.

In a separate sentencing decision (*R. v. Mossman* **2023 BCPC 215**), the Court ordered Mr. Mossman to pay a total of C$29,996 in fines and victim surcharge levies. In determining the sentence, the Court noted Mr. Mossman's personal circumstances, including his expression of remorse, the C$300,000 annual remuneration he received while president of BIG, the stigma and negative press attached to his convictions, and his family circumstances. The Court also noted several aggravating factors, including that the offences occurred on the territory of high spiritual, cultural and traditional importance for the Gitxaala Nation, that the offences occurred during mining exploration that was permitted but opposed by the Gitxaala Nation, and that the offences resulted from a lack of systemic safeguards resulting from BIG management prioritizing company cash flow over environmental testing needs, and Mr. Mossman's indirect profit from the continuing operation of BIG's mining operations as a result of the offences.

R. v. Stuart Placers Ltd., 2023 YKTC 38

In this sentencing decision, the Yukon Territorial Court imposed C$57,500 in financial penalties on Stuart Placers Ltd. (Company), C$34,500 in financial penalties on Roger Stuart, and a six-month probation order on both for offences contrary to Yukon's *Occupational Health and Safety Act* (OHSA). The offences related to the death of an employee resulting from an accident with a bulldozer.

The Company was operating a mine near Dawson City, Yukon. Roger Stuart is one of the Company's two directors. A bulldozer was being delivered to the mine. In order to allow its transportation from British Columbia to the Yukon, it was delivered without its legally required safety equipment installed, including a rollover protective structure (ROPS) and other equipment that had been shipped to the Company separately. The Company's shop was located several kilometres from the point of delivery of the bulldozer along a road maintained by the Company. An employee ultimately lost his life while driving the bulldozer to the shop from the point of delivery when the bulldozer slid off the icy road and rolled over. Had the ROPS been installed, the cab of the bulldozer would not have been flattened in the accident. Mr. Stuart, who was supervising the employee at the time of the accident, acknowledged that the legally required protection could have been installed easily and quickly. The Company and Mr. Stuart each pleaded guilty to two offences contrary to the OHSA while in the position of "employer" and "supervisor" respectively.

The Court noted that the sentences imposed must serve as general deterrence to similar-sized companies and responsible supervisors who may otherwise prioritize convenience over employee safety. The Court reached its decision on the appropriate sentences balancing the very high gravity of the offences and degree of risk; the foreseeability of that risk; and the high degree of fault against its characterization of the company as "a relatively small mining operation;" its view that the actions were based on convenience rather than cost or profit; the Company's previous compliance with industry standards; the lack of previous offences; the employer's response in rerouting the road to prevent future accidents; timely guilty pleas; and Mr. Stuart's genuine remorse.

Case Law Summaries

Environmental Law

Val Lucas

Gibraltar Mines Ltd. v. Director, Environmental Management Act, 2023 BCEAB 7

In ***Mining in the Courts, Vol. XII***, we reported on certain proceedings that underlie Gibraltar Mines Ltd.'s appeal of an amendment to *Environmental Management Act* (EMA) Permit PE-416 (Permit) issued by the British Columbia Ministry of Environment and Climate Change Strategy (Ministry). Our previous summaries related to B.C. Environmental Appeal Board (EAB) decisions in respect of a stay application, a request to reconsider that stay decision and allow Gibraltar to adduce new evidence, and, lastly, the EAB's decision to grant an order

under s. 14(c) of the *Administrative Tribunals Act* (ATA) allowing the Director to amend the Permit to include a "tailings impoundment supernatant" as a source of effluent acceptable for discharge under the Permit (this application was characterized by the Director as rectification of the failure to include the source in the original Permit under appeal). The EAB denied Gibraltar's application for a stay and the request for reconsideration and allowed the Director's requested Permit amendments. The EAB decision summarized in this issue of *Mining in the Courts* relates to two document disclosure applications that are a continuation of the proceedings in respect of the Permit amendment appeal, which has not yet been decided.

The Permit amendment dispute arose out of an operational change at Gibraltar's copper and molybdenum mine (Mine). In order to accommodate mining at the east pit of the Mine, Gibraltar decided to remove water from east pit and transfer it to the Mine's granite pit. The Ministry encouraged Gibraltar to apply to amend the Permit in respect to these water transfer plans. Despite disputing the necessity of the amendment, Gibraltar applied, and the Director issued the amended Permit with additional unsolicited amendments. Gibraltar appealed the decision claiming the additional amendments adversely affect its interests.

Gibraltar sought a series of documents relating to the Permit amendments and the Director's decision. The EAB granted the majority of the production sought, finding that documents relevant to proving or responding to an issue in the appeal should be disclosed. The emails and documents Gibraltar sought were for the most part relevant to whether:

— the unsolicited amendments were unreasonable because they were not necessary for the protection of the environment, exceeded the Director's jurisdiction as they were not necessarily incidental to the amendment applied for and were "unduly vague" and beyond the scope of the Director's power to impose conditions under the *EMA*; and

— the Director breached their common law obligations of procedural fairness by failing to disclose to Gibraltar the reasons, rationale and evidence the Director relied on in imposing the unsolicited amendments, and accordingly the Director failed to give Gibraltar the opportunity to know the case against it and make responsive submissions.

In assessing the scope of disclosure of documents relating to the Director's decision, EAB held that pre-hearing document disclosure is not limited to documents imported into the Director's decision or documents that the Director *relied on*. Further, that individuals may have summarized relevant documents for the Director does not preclude production of the underlying document.

The EAB also was not persuaded that the sensitivity of documents precludes them from being produced unless privilege is claimed. The EAB noted that document sensitivity should be dealt with by making an application pursuant to the EAB's Rules and the ATA to protect sensitive information.

A limited portion of the document production Gibraltar sought was denied as the email sought had previously been disclosed. In considering this part of the application, the EAB emphasized the importance of adhering to the EAB's Practice and Procedure Manual in document applications, including the requirement to demand voluntarily production of the documents before proceeding with an application for production.

Sierra Club of British Columbia Foundation v. British Columbia (Minister of Environment and Climate Change Strategy), 2023 BCSC 74

In *Sierra Club of British Columbia Foundation v. British Columbia (Minister of Environment and Climate Change Strategy)*, 2023 BCSC 74 (Sierra Club), the British Columbia Supreme Court grappled with a public interest challenge to British Columbia's annual climate accountability reporting under the *Climate Change Accountability Act* (Act).

Sierra Club challenged British Columbia's 2021 Climate Change Accountability Report and supporting documents (Report) through a petition on the basis that the Report did not include plans for meeting provincewide targets for 2025, 2040 and 2050 and did not include a plan for meeting the 2030 target to cut carbon pollution in the oil and gas sector. Sierra Club argued that the Report failed to meet the Act's statutory requirements and was therefore an unreasonable exercise of the Minister's reporting obligations.

British Columbia countered the petition by seeking a declaration that its reporting obligations under s. 4.3(1)(h)(i) of the Act were not justiciable. The doctrine of justiciability generally operates to allow courts to decline to decide issues of public policy or issues of whether a law advances the public interest. This doctrine has specifically been applied by the Federal Court to deny public interest litigation relating to climate change regulation (see, *La Rose v. Canada,* **2020 FC 1008** and *Misdzi Yikh v. Canada*, **2020 FC 1059** where the Federal Court dismissed charter claims brought on the basis of a government's failure to stringently regulate emissions were non-justiciable).

Here, the British Columbia Supreme Court found that the interpretation of the Minister's statutory reporting obligations under the Act were justiciable and enforceable and could be assessed by an "objective legal standard considering whether the Minister met the specific, mandatory reporting requirements" (Sierra Club at para. 45). In this respect, Sierra Club was partially successful in its arguments.

Despite the pronouncement of justiciability, the court accepted that the Minister's reporting was reasonable in light of the specific statutory provisions and discretion afforded the Minister under the Act. The detailed reporting Sierra Club sought was not required by the Act. Namely, the Act did not require reporting of information "that would enable … the public to review the form, content, and expected results of BC's climate change initiatives" (para. 75).

There will undoubtedly be continued political pressure on governments to provide accountability and reporting on climate preservation goals, especially considering that the federal government and other provinces have recently passed similar climate change legislation with the purpose of promoting transparency and accountability.[1] We expect public interest groups will continue to push to hold governments accountable in following their newly statutorily mandated climate change reporting obligations.

For more on this decision see McCarthy Tétrault LLP's Canadian ERA Perspectives blog post entitled **Sierra Club of British Columbia Foundation v. British Columbia**.

1 *The Climate and Green Plan Act*, S.M. 2018, c. 30, Sched. A; *Canadian Net-Zero Emissions Accountability Act*, S.C. 2021, c. 22

Article

The Supreme Court of Canada Rules that Part of the Federal Impact Assessment Act is Unconstitutional

Dominique Amyot-Bilodeau and Simon Bouthillier

On October 13, 2023, the Supreme Court of Canada released its reasons in *Reference re Impact Assessment Act*,[1] ruling that part of the federal *Impact Assessment Act* (IAA) and the *Physical Activities Regulations* (Regulations) is unconstitutional. This decision has significant implications for the development of mining projects in Canada, and it provides important constitutional guidance as to what the federal government can and cannot do in reviewing and approving mining projects.

BACKGROUND

The IAA was enacted in 2019 and establishes Canada's federal impact assessment regime for designated projects, as well as projects carried out or financed by federal authorities on federal lands or outside Canada. The Regulations designate physical activities — "designated projects" — such as the construction, operation, expansion, decommissioning and abandonment of mines with a production capacity over a certain threshold or by an order from the federal Minister of Environment (the Minister). Once a project is designated, the Impact Assessment Agency of Canada (the Agency) gathers information about the project and determines whether an impact assessment is required. If so, the IAA requires that the project undergo a detailed federal assessment. Ultimately, the Minister or the governor-in-council decides whether to authorize the project.

In May 2022, the Alberta Court of Appeal held that the IAA and the Regulations were *ultra vires* and unconstitutional in their entirety, as they improperly intruded on matters of exclusive provincial jurisdiction. In June 2022, the federal government appealed. The Supreme Court of Canada heard the appeal in March 2023.

KEY FINDINGS

The Supreme Court determined that the IAA contains two distinct components that must be considered separately, namely: (i) the designated projects scheme; and (ii) the assessment process relating to certain projects carried out or financed by federal authorities on federal lands or outside Canada. A 5-2 majority of the Supreme Court concluded that the designated projects scheme set out in the IAA and the Regulations is unconstitutional.

The Designated Projects Scheme

The majority ruled that the scheme is not in pith and substance directed at regulating "*effects within federal jurisdiction*," because these effects do not drive the decision-making functions under the IAA. Rather, the majority determined that the pith and substance of this scheme is "*to assess and regulate designated projects with a view to mitigating or preventing their potential adverse environmental, health, social and economic impacts*." This exceeds the bounds of federal jurisdiction and cannot be classified under federal heads of power. Therefore, the majority concluded that Parliament has "*plainly overstepped its constitutional competence in enacting this designated projects scheme*."

While Parliament has the power to enact a scheme of environmental assessment, it also has the duty to act within the division of powers framework laid out in the Constitution. If both levels of government have the ability to regulate different aspects of a given project, the Court recognized that one jurisdiction may be broader than the other. Where Parliament is vested with jurisdiction to legislate in respect of a particular activity, it has broad discretion to regulate that activity and its effects. Conversely, Parliament's jurisdiction is more restricted where the activity falls outside of its legislative competence; in these cases, it can validly legislate only from the perspective of the federal aspects of the activity, such as the impacts of the activity on federal heads of power. Federal legislation that is insufficiently tailored — that is, whose pith and substance is to regulate the activity *qua* activity, rather than only its federal aspects — is *ultra vires*.

Applying these governing principles, the majority identified four decision-making junctures embedded in the IAA and addressed the constitutionality of each of them separately, namely: (i) the designation of physical activities; (ii) the screening decision by the Agency; (iii) the scope of information gathering and assessment; and (iv) the public interest decision.

The Designation of Physical Activities as Designated Projects

The majority held that the mechanism pursuant to which physical activities are designated and brought within the ambit of the IAA is not problematic in itself from a constitutional perspective. The fact that a project involves activities primarily regulated by the provincial legislatures does not create an enclave of exclusivity. Requiring definitive proof that a project would have effects on areas of federal jurisdiction prior to an impact assessment would undermine the precautionary principle. The majority

1 2023 SCC 23. McCarthy Tétrault LLP acted for two interveners before the Supreme Court of Canada in this matter. The opinion stated herein are those of the authors only.

concluded that the designation mechanism's focus on federal effects was both "practically necessary and constitutionally sound."

The Screening Decision

While all designated projects are subject to the IAA's planning phase, they are not automatically subject to an impact assessment. Rather, the Agency is empowered under the IAA to make a screening decision as to whether an impact assessment is required for a particular project. Pursuant to the IAA, this decision must take into account various mandatory factors, all of which are seemingly of equal importance, and only two of which relate to adverse effects within federal jurisdiction.

The majority determined that this approach is constitutionally problematic because it allows an impact assessment to be required for reasons not sufficiently tied to the project's possible impacts on areas of federal jurisdiction. This decision must instead be rooted in the possibility of adverse federal effects.

The Scope of Information Gathering and Assessment

Once an impact assessment is required for a given project, s. 22 of the IAA provides a list of factors that must be considered in conducting such an assessment. Alberta argued that several of these factors go significantly beyond matters with a clear connection to federal jurisdiction.

The majority disagreed with this view and noted that the federal government can gather information about a wide range of factors in conducting an environmental assessment. In light of the interrelated nature of environmental matters, it would be both artificial and uncertain in the Court's view to limit the factors that could be studied or considered to those that are federal. Accordingly, the level of government that is undertaking an impact assessment is not restricted to studying or gathering information about those effects that fall within its legislative jurisdiction.

The Public Interest Decision

Pursuant to the IAA, the Minister or governor-in-council must ultimately decide whether or not designated projects are in the "public interest" and can therefore proceed, subject to specific conditions that can be imposed by such authorities. This public interest decision must take into account several mandatory factors listed in the IAA and dictates the nature and extent of ongoing federal oversight of a project.

The majority opined that the broad list of such factors, as set out in the IAA, "*represents an unconstitutional arrogation of power by Parliament*" because it transforms what is *prima facie* a determination of whether *adverse federal effects* are in the public interest into a determination of whether *the project as a whole* is in the public interest.

For example, s. 63(a) of the IAA requires the Minister to consider the project's "sustainability," defined as "*the ability to protect the environment, contribute to the social and economic well-being of the people of Canada and preserve their health in a manner that benefits present and future generations.*" Such a factor encompasses all environmental, social and economic effects of the project, not only those that the federal government has jurisdiction to regulate. This reinforced the Court's conclusion that the pith and substance of the scheme cannot be classified under federal heads of power and that the scheme is therefore *ultra vires*.

The Assessment Process Related to Projects Carried Out or Financed by Federal Authorities on Federal Lands or Outside Canada

As previously mentioned, the Court analyzed separately ss. 81 to 91 of the IAA, which establish an impact assessment process applicable mostly to projects carried out or financed by federal authorities on federal lands or outside Canada.

According to the majority, the pith and substance of this scheme is to "*direct the manner in which federal authorities that carry out or finance a project on federal lands or outside Canada assess the significant adverse environmental effects that the project may have*." The constitutionality of this scheme was not specifically challenged, and the Supreme Court confirmed that those provisions of the IAA are constitutional. Specifically, the majority held that the federal government can consider all potential impacts of projects that it undertakes or funds and make decisions about those projects accordingly.

DISSENTING REASONS

In their dissenting opinion, Justices Jamal and Karakatsanis indicated that the entirety of the IAA and the Regulations should be upheld. In their view, the screening decision stage is constitutional because the Agency's discretionary decision is anchored in the possibility that the designated project would cause adverse federal effects. If the Agency exercised its discretion to require a project with little or no potential for adverse federal impacts to undergo an impact

assessment, such a decision would be unreasonable and would be subject to judicial review.

The minority would have upheld the constitutionality of the public interest decision process. In support of this view, it noted that the Court's jurisprudence recognizes that a federal environmental assessment process can involve an integrated decision-making process that weighs both the federal and non-federal harms that may be caused by a designated project, as well as any benefits that may accrue from the project. Again, if federal authorities try to rely on a trivial adverse federal effect as a "constitutional Trojan horse" enabling them to conduct a far-ranging inquiry into a designated project, the federal action would be subject to judicial review.

Conclusion

The Court's decision will have consequences for mining proponents whose projects are designated under the IAA. This case confirms that the federal government has the power to enact broad impact assessment laws and consider a wide range of factors in conducting such assessments. However, the federal impact assessment scheme must be carefully crafted to ensure that only projects that can result in adverse federal effects are targeted. Where the federal government does not have jurisdiction over a specific activity (e.g., mining operations), federal legislation must also be sufficiently tailored to avoid regulating the activity itself and focus instead on the federal aspects of such activity.

On October 13, 2023, the federal Minister of Environment issued a **statement** acknowledging the decision and confirming that the government of Canada would work quickly to improve the IAA through Parliament and collaborate with provinces and Indigenous groups to ensure an impact assessment process that works for all Canadians.

On October 26, 2023, the federal Minister of Environment released **guidance** on the interim administration of the IAA until it is amended. The guidance provides:

For projects currently under assessment:

— The Agency will assess all such projects and provide an opinion on whether they impact areas of federal jurisdiction.

— Proponents are invited to continue sharing information to advance their assessments.

— Consultation will continue with Indigenous Peoples through existing assessment processes as they relate to a clear area of federal jurisdictional responsibility.

For future projects:

— The Minister's discretionary authorities to designate projects will be paused.

— Consideration of any new designation requests will only resume, as appropriate, once amended legislation is in force.

— The Agency remains prepared to provide an opinion on whether a full impact assessment is warranted and to invite proponents to collaborate on an assessment.

For regional assessments:

— The three regional assessments underway (Ring of Fire in Ontario and offshore wind in Nova Scotia and Newfoundland and Labrador), will continue, as these seek only to understand impacts and do not involve decision-making on specific projects.

These recent developments will require careful consideration by project proponents.

Case Law Summaries

Injunctions

Jack Ruttle

Baffinland Iron Mines Corporation v. Naqitarvik, 2023 NUCA 10

In ***Mining in the Courts, Vol. XII***, we reported on the decision of the Nunavut Court of Justice in **2021 NUCJ 11**, in which the Court granted an interlocutory injunction against protesters at the Mary River Project on Baffin Island restraining them from blocking access to the mine site. In this decision, the Nunavut Court of Appeal upheld that injunction.

Baffinland Iron Mines Corporation operates an iron ore mine at Mary River on Baffin Island. The mine site has two main access points: the 100-km Tote Road to Mile Port, where ore is loaded onto ships and a private airstrip. About 700 employees use the airstrip to leave the mine site. On February 4, 2021, residents from local communities set up small protest camps on Tote Road and the airstrip. The

protests halted operation of the mine for several days and stopped the movement of people and supplies to and from the mine site. Baffinland commenced an action against the protesters and applied for an interlocutory injunction. On February 9, 2021, Baffinland, after a without notice application, was granted a limited interim injunction to allow the transport of employees from the mine site. A few days later, the Court dismissed an application by the protesters to adjourn the interlocutory injunction application so that they could cross-examine Baffinland's affiants, among other things.

The Court granted the interlocutory injunction on March 2, 2021, 20 days after the proceeding had first been commenced and before evidence from the protester's cross-examinations of Baffinland affiants was available (the crosses had occurred while the injunction decision was under reserve).

The protester's appealed, raising complaints about the procedural fairness of the injunction because the first application was without notice, and the Court had not considered the cross-examination evidence. The Court rejected these arguments. Injunction applications almost always occur in urgent circumstances. The lower court had ensured at least some notice before the interim injunction hearing and included in the second injunction the possibility of a review on very short notice. The protester's complained about various procedural shortcomings, but it was their actions that caused the urgent situation in which those shortcomings could arise.

The Court of Appeal also rejected the protester's argument that the lower court ultimately should not have granted the injunction. Importantly, the court found that the blockade was unlawful. It interfered with Baffinland's lawfully permitted mining. The Court disagreed with the protester's assertion that Baffinland did not come to court with "clean hands" (an equitable doctrine). The protester's argued Baffinland's hands were not clean because it did not inform the court about some of the circumstances of the protest. As the Court concluded:

> The [protesters] cannot rely on equitable doctrines to shift onto [Baffinland] the moral responsibility for the situation they themselves created. [Baffinland] did not offend any principles of equity by using court processes to defend itself against the unlawful blockade.

In a related decision, the Nunavut Court of Justice heard a reference[1] under Nunavut's *Land Title Act* asking whether a *lis pendens* could be registered against lands leased from Qikiqtani and Tunnqavik by Baffinland. The Court did not permit the registrar to file the *lis pendens*.

Where a litigant claims an interest in land, they may file certificate of *lis pendens* on title to those lands, which gives assurance that the defendant cannot dispose of the land while the litigation is ongoing.

Some of the protesters had filed a counterclaim to Baffinland's February 9, 2021 claim, which Baffinland filed in response to the blockade. The counterclaim asserted that the protester's lands, hunting rights and the environment were being adversely and illegally affected by dust pollution from the mine site. After commencing the counterclaim, they sought to have their *lis pendens* registered. The Court held it could not be registered. To file a *lis pendens*, a claimant must be able to obtain an interest in the land through a claim. The protester's counterclaim provided no avenue to gain title or an additional interest in the lands leased by Baffinland and the right to access, hunt and file a claim complaining of environmental action were insufficient to file a *lis pendens*.

1 *IN THE MATTER OF: A reference under the Land Titles Act*, **2023 NUCJ 4**.

Case Law Summaries

Labour and Employment

Justine Lindner, Chris Boettcher, Jessica Hoskins and Lauren Soubolsky

Occupational Health and Safety Conviction re: Christina River Construction Ltd. and Suncor Energy Service Inc.

In November 2022, Suncor Energy Services Inc. (Suncor) and Christina River Construction Ltd. (CRC) faced 28 charges under the *Alberta Occupational Health and Safety Act* (OHSA) after an incident where a dozer attempted to clear snow on a tailings pond but broke through the ice and became fully submerged, resulting in the death of the operator.[1] According to an agreed statement of facts, it was admitted that the previous ice measurements had shown it was too thin to bear the weight of the dozer; however, neither Suncor nor CRC prevented the dozer from operating on the pond.

On April 14, 2023, Suncor and CRC each pleaded guilty to one charge, while all others were dropped. Suncor, the prime contractor on the work site, pleaded guilty to a contravention of s. 10(5)(b) of the OHSA for failing to co-ordinate, organize and oversee the performance of all work at the work site so as to ensure that no person was exposed to hazards arising from activities at the work site. CRC, a contractor on the work site, pleaded guilty to a contravention of s. 9(1) of the OHSA for failing to ensure the work site and every work process under their control did not create a risk of health and safety of any person.

At sentencing, a total of C$745,000 in fines were ordered against the companies. Suncor was fined C$50,000 and ordered to pay C$370,000 as a creative sentence under s. 49 of the OHSA in favour of the Lynch School of Engineering and Risk Management. CRC was ordered to pay a creative sentence of C$275,000 in favour of a memorial scholarship and safety award in the worker's name, as well as the subsidization of safety-related training courses.

1 Government of Alberta, Occupational Health and Safety Investigation Report **F-OHS-233548**.

As recently discussed in our Canadian Construction Law Blog post **"The Final Word: the 'Owner' of a Construction Project is also an 'Employer' under OHSA,"** occupational health and safety legislation fulfils its goal of maintaining and promoting workplace health and safety by allocating health and safety responsibilities among various workplace actors, with such responsibilities often being concurrent and overlapping (referred to by the SCC as the "belts and braces" approach). The Suncor and CRC conviction highlights the "belts and braces" approach to health and safety in Alberta and provides a sombre reminder as to the importance of, and need for, such processes.

Alberta Health Services v. Johnston, 2023 ABKB 209

In this decision, the Alberta Court of King's Bench formally recognized the tort of harassment in Alberta. Previously, Alberta courts did not accept the existence of a specific civil action for harassment, generally preferring to find that such claims should be advanced through administrative bodies, such as the Alberta Human Rights Commission or the Alberta Workers' Compensation Board.

In 2021, Mr. Johnston used his political campaign for Calgary's mayoral election, as well as his significant social media presence, to criticize Alberta Health Services' (AHS) response to the COVID-19 pandemic. Among other comments, Mr. Johnston referred to AHS and its employees as "Nazis," "fascists" and "terrorists." He suggested that AHS and its employees committed numerous crimes and deserved to have violent acts committed against them and specifically singled out and abused one AHS employee and her family. AHS and two AHS employees, both public health inspectors, brought an action against Mr. Johnson for defamation, tortious harassment, invasion of privacy and assault.

In its decision, the Court affirmed its power to recognize new torts in order to "keep the law aligned with the evolution of society" and where "the harm in question cannot be adequately addressed by recognized torts." Analyzing existing torts, including defamation, invasion of privacy and assault, the Court found that none adequately addressed the circumstances. The Court therefore recognized the tort of harassment to fill a perceived gap in the law:

> Based on the foregoing, I define the tort of harassment as follows. A defendant has committed the tort of harassment where he has:
>
> (1) engaged in repeated communications, threats, insults, stalking, or other harassing behaviour in person or through or other means;
>
> (2) that he knew or ought to have known was unwelcome;
>
> (3) which impugn the dignity of the plaintiff, would cause a reasonable person to fear for her safety or the safety of her loved ones, or could foreseeably cause emotional distress; and
>
> (4) caused harm.

In finding that Mr. Johnston committed the tort of harassment, particularly targeting one of the AHS inspectors, the Court awarded the individual plaintiff C$100,000 in general damages.

While it is likely that employees and their counsel will attempt to rely on the reasoning in *Johnston* in wrongful dismissal actions, its application in the employment context remains untested. Given that workers' compensation legislation provides a statutory bar for most claims for injuries resulting from workplace harassment and human rights legislation addresses harassment in the employment context, the tort of harassment is unlikely to see much traction in employment litigation.

British Columbia (Human Rights Tribunal) v. Gibraltar Mines Ltd., 2023 BCCA 168

In this decision, the British Columbia Court of Appeal confirmed a broader test for establishing family status discrimination in British Columbia. A unilateral change in employment terms by the employer is no longer a necessary precondition to family status discrimination. All that is required is a serious interference with a substantial parental or other family duty or obligations, which can arise both when employment terms change or when they remain constant.

Lisa Harvey and her husband both worked the same 12-hour shift as employees of Gilbraltar Mines Ltd. Upon returning from maternity leave in 2017, Ms. Harvey requested adjustments to her work schedule so her family could access childcare, which Gilbraltar refused. Gilbraltar later proposed an alternative schedule, which Ms. Harvey refused. Ms. Harvey then filed a human rights complaint against Gilbraltar, alleging they failed to accommodate her by denying her request and discriminated against her on the basis of a number of protected grounds, including family status.

Gibraltar applied to the B.C. Human Rights Tribunal to dismiss Ms. Harvey's human rights complaint, arguing her complaint had no reasonable prospect of success, in part, because Ms. Harvey's shift hadn't changed, and this was a required element of family status discrimination in British Columbia pursuant to the *Campbell River* test. The *Campbell River* test requires an employee to establish two factors to prove they have been discriminated against on the basis of their family status: (i) the employer made a unilateral change to a term or condition of employment; and (ii) the change results in a serious interference with a substantial parental or other family obligation.

In applying the *Campbell River* test, the Tribunal permitted Ms. Harvey's claim of family status discrimination to proceed, while dismissing her other discrimination claims. The Tribunal held that, notwithstanding the *Campbell River* test, a "serious interference" entitling an employee to accommodation based on family status could be established even when there is no change to the employee's terms of employment.

On judicial review, the British Columbia Supreme Court held in favour of Gilbraltar, stating that the Tribunal's interpretation was incorrect, and it confirmed the *Campbell River* test. However, at the British Columbia Court of Appeal, a five-judge panel agreed with the Tribunal. The Court of Appeal decided that a change to the terms or conditions of employment was not necessary to establish a *prima facie* case of family status discrimination. It emphasized that human rights legislation, which is considered to be quasi-constitutional, must be given a broad and liberal interpretation. Therefore, neither *Campbell River* nor the *Human Rights Code* should be interpreted as restricting the protections afforded to employees.

The Court of Appeal concluded that, while *Campbell River* remains good law, family status discrimination can occur without a unilateral change to employment by the employer. Both an employer's decision to change the terms of employment and an employer's decision not to change a term of employment to address an employee need could adversely impact an employee. Ultimately, "[t]he discrimination inquiry is concerned with the impact of the employment term on the employee, not the intention of the employer" (para. 73).

For more on this decision, see McCarthy Tétrault LLP's Employer Advisor blog post entitled "**British Columbia Court of Appeal finds that employers can discriminate against employees based on family status without a change in employment terms**."

Teck Highland Valley Copper Partnership (THVCP) v. United Steel Workers, Local 7619, 2023 CanLII 38628 (BC LA)

In this decision, an arbitrator interpreted the sick pay requirements of British Columbia's *Employment Standards Act* to allow employers to pay employees for partial days of sick pay in circumstances where they work a partial day before going home sick. An entitlement to five paid sick days per year was introduced into the *Employment Standards Act* in British Columbia on January 1, 2022. In non-unionized settings, employees can bring allegations of non-compliance with the *Employment Standards Act* to the Employment Standards Branch. In unionized settings, unions can bring a grievance and have the issue decided by an arbitrator who can interpret the requirements of the legislation.

This decision concerned a unionized employee who worked on a rotation of four 12-hour shifts followed by four days off. On July 1, 2022, the employee attended at work for the first six hours of his shift before going home sick. Teck Highland Valley Copper Partnership (Teck) paid the employee six hours of regular pay for the time he actually worked and six hours of sick pay for the remainder of his shift. Additionally, the employee was paid 12 hours of statutory holiday pay because it was Canada Day.

The union filed a grievance on behalf of the employee, arguing the employee had been incorrectly paid. In the union's view, the employee should have received six hours of regular pay for the time he worked *and* 12 hours of sick pay (instead of the six hours the employee received), in addition to 12 hours of statutory holiday pay. The union relied upon the policy interpretation of the Employment Standards Branch's *Guide to the Employment Standards Act and Regulation* (Guide), which states, "the Act does not allow for "partial" sick days."

Teck argued the union's position — that the employee receive 18 hours of pay, in addition to statutory holiday pay — was inconsistent with the intention of the legislature. Teck argued the union's argument was built upon the erroneous policy interpretation provided in the Guide and that the legislative intent for paid sick leave was not to provide a windfall to employees who worked partial days before going home sick.

The arbitrator dismissed the grievance, concluding that the employee was only entitled to six hours of sick pay, although he would be considered to have used a full day of his paid sick leave allotment (despite only being off work for a portion of his scheduled shift). In the arbitrator's view, the Guide's reference to there being no "partial" sick days means that, regardless of how much time is taken off in a given day, it will result in a full day of the sick leave allotment considered used and deducted from one's annual allotment.

The arbitrator reasoned that the Guide is neither binding nor a legal authority, and that the interpretation within the Guide is contrary to the intention of the legislation as it creates an unintended windfall to employees by effectively encouraging them to work partial days before taking paid sick leave. In the arbitrator's view, the interpretation advanced by Teck was consistent with the true intention of the legislature as it ensures that employees are not financially harmed by illness or injury, but at the same time, it is fair to employers.

Additionally, the arbitrator suggested that portions of the *Employment Standards Act* relating to sick leave may require future amendments as it seems the legislature did not fully contemplate analogous scenarios when drafting and debating the relevant sections regarding sick leave.

International Union of Operating Engineers, Local 793, Applicant v. Argonaut Gold Incorporated, 2023 CanLII 105596 (ON LRB)

This case further defines the limits of labour unions' access to employees for the purpose of organizing. At the heart of the matter is how one defines "a property to which the employer has the right to control access" pursuant to s. 13 of Ontario's *Labour Relations Act*:[2]

> 13. Where employees of an employer reside on the property of the employer, or on property to which the employer has the right to control access, the employer shall, upon a direction from the Board, allow the representative of a trade union access to the property on which the employees reside for the purpose of attempting to persuade the employees to join a trade union.

The International Union of Operating Engineers, Local 793 (Local 793 or the applicant) filed an application with the Ontario Labour Relations Board (OLRB) under s. 13 of the *Labour Relations Act* seeking access to the Magino Lodge site for the purpose of attempting to persuade employees to join a trade union. They named two responding parties, Argonaut Gold Incorporated (Argonaut Gold) and Sigfusson Northern Limited (SNL), which were both engaged in the development of the mine site and processing site. Argonaut Gold's wholly owned subsidiary, Prodigy, was the project developer and holder of the land tenure. SNL is a general contracting and heavy civil construction firm. Local 793 was attempting to organize the employees of SNL working on the project.

The OLRB dismissed the application finding the respondents were not employers controlling access under s. 13.

The Magino Lodge was an area leased by Argonaut Gold. SNL shuttled its employees by bus to and from the Lodge to the mine site before and after their shift. Local 793 argued that the responding parties controlled access to the Lodge, thus s. 13 was engaged. However, according to both SNL and Argonaut Gold, SNL "does not own, lease or have any control over the property or the trailers in question." Both respondents further contended that access to the Lodge was controlled by Prodigy and two security contractors (NORCAT and N1 Solutions Inc.). SNL also argued security was solely Argonaut's responsibility.

The OLRB agreed that SNL did not have the right to control access to Magino Lodge. In support of this finding, the OLRB drew attention to the fact that SNL was merely in charge of controlling which employees were assigned to work for it at the project and thus were listed for admission at the Lodge. However, SNL had no control whether they ultimately were admitted. Moreover, once they were at the Lodge, SNL had no say on whether they were ultimately allowed to stay; for instance, SNL did not create the housing or security policies, nor did they enforce them. Ultimately, the OLRB found this did not meet the threshold contemplated by s. 13 of an employer controlling access.

2 **Section 13** of the ***Labour Relations Act, 1995, S.O. 1995, c. 1, Sch. A***.

Article

Ontario's Occupational Health and Safety Regime for Construction Projects Reviewed by the Courts: A Discussion of Diligence Measures for Mining Employers

Ben Ratelband, Justine Lindner and Alexander Steele

Mining companies often engage in construction projects that are subject to the Ontario *Occupational Health and Safety Act* (OHSA) regulation titled Construction Projects.[1] A mining company may contract with a general contractor or subcontractors in association with those projects and be subject to the regulation.

In November 2023, the Supreme Court of Canada issued a key ruling regarding the regulation's interpretation in ***R. v. Greater Sudbury* (City), 2023 SCC 28**, holding that an owner, the City of Greater Sudbury (Sudbury), which had contracted with a third-party constructor to undertake a construction project, still retained overlapping duties as an "employer" to ensure worker health and safety in the workplace in accordance with the OHSA. The decision has significant consequences for construction projects in Ontario and may potentially impact owners of projects in other Canadian jurisdictions, including mine owners involved in construction projects as part of the mine's development.

We anticipate further guidance from the provincial offences appeal court on best practices for owners; however, in the interim, an owner of a mine site undertaking construction with a contractor or subcontractor should consider the following factors when planning and reviewing this type of construction project (to ensure it is properly duly diligent should a workplace health and safety issue arise): (i) the degree of control the owner maintains over the workplace; (ii) any contracts or agreements delegating control to a constructor must be carefully crafted and the rationale for the delegation should it relate to overcoming lack of skill, knowledge or expertise to comply with the OHSA regime should be emphasized; (iii) whether there has been a careful assessment and evaluation of the constructor's ability to ensure compliance with the OHSA regime prior to contracting; and (iv) the documentation of monitoring and supervision of the constructor's work to ensure compliance with the OHSA throughout construction in case issues arise.

THE OHSA REGIME FOR CONSTRUCTORS

The OHSA sets out the duties and responsibilities of various defined workplace parties to protect the health and safety of workers in the workplace. The OHSA defines workplace;[2] employer;[3] and constructor[4] broadly.

Courts have consistently held that an employer's duties and responsibilities to protect worker health and safety extend not just to its own employees but also to third-party contractors that the employer contracts with to provide services.[5] This extended definition of employer applies to various kinds of employment and employer-contractor arrangements in a variety of workplaces, both in construction and non-construction contexts.

While the OHSA does not allow a workplace party to contract out of or otherwise delegate its statutory duties under the OHSA, where there is a construction "project," the OHSA carves out a special regime that allows an owner of a construction project to relinquish overall responsibility for health and safety on the project to a designated "constructor" that maintains overarching responsibilities to ensure health and safety on a construction project.[6]

The OHSA offences are strict liability offences. That is, the Crown need not prove intent to establish the charge. To ground a conviction, the Crown merely has to prove all of the elements of the offence occurred beyond a reasonable doubt. However, if an accused can establish, on a balance of probabilities, that it took all reasonable care in the circumstances to prevent the commission of the offence or that it had an honest but mistaken reasonable belief in facts which, if true, would render its conduct innocent, then the accused will have a complete defence and will be acquitted. This is widely referred to as the "due diligence defence."

BACKGROUND ON THE CASE

This case arose following a tragic pedestrian death during a construction project in Sudbury, which had hired Interpaving Limited (Interpaving) to repair a water main.

The contract between Sudbury, as owner, and Interpaving, as the general contractor, specified that Interpaving was undertaking the repair work, it was a "constructor" under the OHSA, and it would be responsible for ensuring the project met the OHSA requirements. This was a typical construction project contractual arrangement. Interpaving

1 **O. Reg. 213/91: Construction Projects**.
2 *Occupational Health and Safety Act*, RSO 1990, c. O.1, s. 1(1), "workplace … any land, premises, location or thing at, upon, in or near which a worker works."
3 *Occupational Health and Safety Act*, RSO 1990, c. O.1, s. 1(1), "employer" as "a person who employs one or more workers or contracts for the services of one or more workers and includes a contractor or subcontractor who performs work or supplies services and a contractor or subcontractor who undertakes with an owner, constructor, contractor or subcontractor to perform work or supply services."
4 *Occupational Health and Safety Act*, RSO 1990, c. O.1, s. 1(1) "constructor" as "a person who undertakes a construction project for an owner and includes an owner who undertakes all or part of a project by himself or by more than one employer."
5 *R. v. Wyssen*, **1992 CanLII 7598** (ONCA).
6 *Occupational Health and Safety Act*, RSO 1990, c. O.1, s. 23.

filed a "Notice of Project" with the Ministry of Labour, Immigration, Training and Skills Development (the Ministry) identifying itself as the constructor.

In May 2015, Interpaving began work and Sudbury employed inspectors to attend the job site for quality assurance purposes to monitor the progress of work and confirm the work being performed was consistent with the contract. Inspectors did not direct work and were required to follow Interpaving's job site health and safety requirements.

On September 30, 2015, a road grader employed by Interpaving struck a pedestrian while she was walking through the live intersection where the grader was working. Police did not control the intersection, there were no signallers, and the job site lacked a 1.8-m barrier fence, all of which were required by the contract. Two weeks prior, city inspectors attending the site had observed a lack of police officers and noted the non-compliance. Interpaving stopped the work until paid duty police officers could be arranged.

In practice, Interpaving had requested paid duty police officers to direct traffic from Sudbury, which then forwarded the request on to Sudbury's police department. The Ministry formed the view that Sudbury's role as a conduit for paid duty police requests rendered Sudbury the project's "constructor" and ordered it to file a Notice of Project. The order was appealed and subsequently suspended pending the outcome of the ensuing OHSA prosecution.

The Ministry charged Sudbury and Interpaving with violations of **Construction Projects** regulation, contrary to the OHSA s. 25(1)(c), which requires employers to ensure that the measures and procedures prescribed are carried out in the workplace. The Ministry charged Sudbury for acting as both "constructor" and "employer" under the OHSA. Interpaving pleaded guilty, but Sudbury proceeded to trial.

TRIAL DECISION

When the matter reached trial there were three issues at play: (i) whether Sudbury was a "constructor" under the OHSA; (ii) whether Sudbury was an "employer" under the OHSA; and, (iii) if Sudbury was an "employer" or "constructor," whether it had exercised due diligence.

Ultimately, the trial judge found that while there were safety defects on the project, Sudbury could not be convicted, as it was neither a constructor nor an employer for the project. Further, even if Sudbury had filled either role, it had exercised due diligence. Sudbury was acquitted.

ONCA DECISION

The Ontario Court of Appeal (ONCA) granted the Crown leave to appeal to "determine whether the appeal judge erred in concluding that Sudbury was not an employer under the Act." The appeal was allowed, with the ONCA ruling that Sudbury was an employer under the OHSA.[7] Sudbury was therefore guilty of the OHSA offences, unless it could establish a due diligence defence.

The issue of whether Sudbury had made out the defence of due diligence was remitted back to the Superior Court for its consideration.

THE SUPREME COURT OF CANADA DECISION

Sudbury appealed the ONCA's decision to the SCC.[8] The SCC dismissed Sudbury's appeal, but the decision was split equally, with four judges dissenting.

Reasons

Justice Martin's decision affirmed the ONCA's decision that Sudbury was an "employer" under the OHSA.

Unlike the ONCA, the SCC considered the question of whether the degree of control is relevant to an analysis of whether an owner can be considered an employer in the context of a construction project. The SCC decision provides that the degree of control exercised by an owner over the work site is irrelevant to the determination of whether it falls under the definition of "employer" under the OHSA and whether it breaches a provision of the OHSA setting out the obligations of an "employer." The degree of control analysis is instead relevant to the due diligence defence.

Justice Martin divided her decision into three parts: (1) providing an overview of the OHSA; (2) explaining why control need not be proved in a prosecution under s. 25(1)(c) of the OHSA; and (3) providing comments on the role of control in relation to the due diligence defence under s. 66(3)(b) of the OHSA.

The SCC decision concluded that Sudbury was an "employer" in relation to the project, both due to the existence of its direct employees, who were quality control inspectors auditing the site, and for having entered into a contract for services with the constructor, Interpaving.[9]

The SCC decision also concluded that Sudbury committed the offence under s. 25(1)(c) of the OHSA and its degree of control over the workplace was not relevant to this finding.[10]

An employer's level of control instead informs the due diligence defence analysis. The relevant considerations for the analysis are summarized in paragraph 61:

> […]Relevant considerations may include, but are not limited to, (i) the accused's degree of control over the workplace or the workers there; (ii) whether the accused delegated control to the constructor in an effort to overcome its own lack of skill, knowledge or expertise to complete the project in compliance with the Regulation; (iii) whether the accused took steps to evaluate the constructor's ability to ensure compliance with the Regulation before deciding to contract for its services; and (iv) whether the accused effectively monitored and supervised the constructor's work on the project to ensure that the prescriptions in the Regulation were carried out in the workplace.[11]

Dissenting Reasons

In their dissent, Justices Rowe and O'Bonsawin focused on an employer's duties under the OHSA and sought to preserve existing integrity of the scheme as a whole. After conducting a thorough analysis on the history of the OHSA and the construction regulation, they held that the OHSA's role is to hold employers accountable when work is performed that the employer controlled and performed through their workers.[12]

Justices Rowe and O'Bonsawin held that treating the owner-constructor relationship as an employer-worker relationship ignores the practical differences between the two relationships and may undercut worker safety.[13]

In her concurrent dissenting reasons, Justice Côté held that: (i) Sudbury was not an employer under the Act; and, (ii) that Sudbury had not acted as an employer on the construction site.[14] Justice Côté agreed with the analysis of Justices Rowe and O'Bonsawin, concluding both that s. 25(1)(c) must be read in context and that a

7 *Ontario (Labour) v. Sudbury (City)*, **2021 ONCA 252**.
8 ***R. v. Greater Sudbury* (City), 2023 SCC 28.**
9 *R. v. Greater Sudbury (City)*, 2023 SCC 28, at paragraph 22.
10 *R. v. Greater Sudbury (City)*, 2023 SCC 28, at paragraph 46.
11 *R. v. Greater Sudbury (City)*, 2023 SCC 28, at paragraph 61.
12 *R. v. Greater Sudbury (City)*, 2023 SCC 28, at paragraph 66.
13 *R. v. Greater Sudbury (City)*, 2023 SCC 28, at paragraph 103.
14 *R. v. Greater Sudbury (City)*, 2023 SCC 28, at paragraph 164.

project employer is not an employer of a constructor or a constructor's workers. Justice Côté viewed it as significant that the majority's decision would not only change Ontario industry practice on construction projects, it would also provide a disincentive for project owners to engage in quality control measures.

IMPLICATIONS OF THE SCC DECISION FOR EMPLOYERS ENGAGED IN CONSTRUCTION PROJECTS

In our view, some of the uncertainty introduced by the ONCA reasons remains regarding the potentially broad scope of a project owner's duties and responsibilities under the OHSA to ensure the health and safety of workers on a project by virtue of being an employer despite a constructor having been designated for the project. What reasonable precautions should an owner, which is also an employer because it has workers present on the project or by virtue of merely having contracted with a constructor, take to comply with its duties under the OHSA? Presumably, in keeping with the established principles of due diligence, it will depend on the circumstances. While the SCC offers some guidance on what circumstances may be relevant to an owner in making such an assessment (discussed below), this remains an open question and presents a challenge for project owners. As the issue of Sudbury's due diligence has been remitted to the provincial offences appeal court for a determination, hopefully that decision will provide necessary clarity and guidance to owners.

The SCC decision fails to clarify the scope of the duties and responsibilities of an employer that has workers on a project under the OHSA in relation to the workers of other employers on the construction project. Sudbury was found to be an employer under both branches of the definition — that it had employees on the project (the quality control inspectors) and that it had contracted for the work to be performed with the constructor. Construction projects are dynamic places, and it is common for there to be multiple employers that have workers on a construction project at the same time, often working in close proximity. While the decision of Justice Martin addresses this concern by noting that there is a distinction between the definition of "workplace" and "project," reasoning that it is "unlikely" that an employer's workplace would span the entirety of the project, the ONCA and SCC decisions open the door to the potential ascription of liability to an employer in relation to work being performed by the workers of other employers on the project because the employer happens to have employees on the project as well.

The SCC decision appears to allow for owners or other employers on a construction project to be charged in their capacity of "employer" under the OHSA for any alleged non-compliance with regulatory requirements on a project work site, at the discretion of Ministry inspectors and prosecutors. Given recent legislative amendments that increase the maximum fines under the OHSA for corporations to C$2 million upon conviction, the stakes involved in such charges are higher than they have ever been for companies engaged in construction in Ontario.

APPROACH TO DUE DILIGENCE MEASURES

The impact of the SCC's decision is that an "owner" that contracts for services, including where the owner designates a "constructor" under the OHSA, retains overlapping responsibility for health and safety in its capacity of an employer. Under the OHSA, employers have much broader responsibilities for the health and safety of workers in the workplace than the specific, express responsibilities of a project owner. In light of the SCC decision, owners and other employers on construction projects may wish to reassess the sufficiency of their due diligence measures moving forward.

The reasonableness of such measures and whether they meet the standard of due diligence will depend on the circumstances. There is no "one-size-fits-all" answer to the question of whether a workplace party has been duly diligent. Fortunately, as mentioned previously, the SCC offers some guidance by listing some considerations that may be relevant in assessing whether an owner that contracts for the services of a constructor on a construction project has exercised due diligence in the owner's capacity as an employer:

— **Degree of control over the workplace and workers:** The SCC decision confirms that it is already well-established in the jurisprudence that control is a factor to be considered in assessing whether reasonable care has been taken. Part of a workplace party's due diligence defence will involve describing the level of control that it could reasonably be expected to exercise over the workplace and workers to demonstrate that it took all reasonable precautions in the circumstances — i.e., all reasonable precautions that it was reasonably capable of taking in the circumstances.

— **Whether control was delegated to a constructor to overcome lack of skill, knowledge or expertise to complete the project in compliance with the regulation:** The SCC Decision states "[i]n the

construction context, it may be open to a judge to find that the owner took every reasonable precaution because the owner decided to delegate control of the project and responsibility for workplace safety to a more experienced constructor." To demonstrate that the owner delegated the work to a more experienced or better qualified constructor requires an understanding of the respective experience and expertise of both parties for ensuring compliance with the OHSA. There are a number of ways an owner and constructor could approach documenting this information at the procurement stage and when entering into a general contract for the construction project.

— **Whether the constructor's ability to ensure compliance with the regulation was evaluated prior to contracting for service:** The SCC explains that the pre-screening of a contractor may be a relevant consideration in assessing whether an owner has been duly diligent when engaging a third-party constructor for a project. There are a number of ways an owner and constructor could approach documenting this information at the procurement stage and when entering into a general contract for the construction project in order to bolster a due diligence defence.

— **Whether the accused monitored and supervised the constructor's work on the project to ensure compliance with the construction regulation:** Based on the SCC's decision, a prudent project owner may wish to ensure that such auditing includes monitoring health and safety compliance. The SCC's discussion leaves open the nature and extent of monitoring and oversight of health and safety matters by an owner/employee in order to demonstrate due diligence in a given set of circumstances. The answer to that question will need to be assessed on a case-by-case basis, and depending on the circumstances, the approach for one project may not be the approach that ought to be taken in every project. It is typical for project owners, in a manner similar to Sudbury, to conduct audits or other quality control inspections of a construction project so as to ensure that the contract is being fulfilled. These audits often address issues such as terms of engagements with subcontractors, costs of goods and materials, whether the work meets the specifications of the contract, timelines and other budget-related considerations. Based on the SCC's decision, a prudent project owner may wish to ensure that such auditing includes monitoring health and safety compliance.

The factual circumstances underlying the decision, which involved a project taking place on a public road over which the municipality had specific legal obligations under the *Highway Traffic Act*, and where Sudbury's inspector had previously issued an instruction form to the constructor regarding the very safety issue that led to the death of a member of the public, are somewhat unique. While the structuring of the relationships among the owner, constructor and employers on Sudbury's project site may be analogous to other construction projects, the somewhat unique facts in this case may limit broad generalizations from the SCC's rule and any determinations the provincial offences appeal court ultimately makes regarding Sudbury's due diligence defence now that the issue has been remitted to that court for consideration. The unique factual circumstances may also impact how other courts interpret and apply the SCC's decision to other factual circumstances.

REQUEST FOR REHEARING OF THE APPEAL

On December 8, 2023, Sudbury filed a motion for rehearing of the appeal. Responses were filed by the Retail Council of Canada, various municipalities and the Workers Compensation Board of British Columbia — each of which intervened in the initial appeal in support of Sudbury. The Ontario Ministry of the Attorney General (Ministry of Labour, Immigration, Training and Skills Development) filed its response to the motion on January 4, 2024. As of the date of publication, the SCC has not decided this motion.

Case Law Summaries

Municipal Law

Konstantin Sobolevski and Charles-Etienne Presse

Forcier & Frères ltée c. Ville de Malartic, 2023 QCCA 746

In this case, the Court of Appeal of Québec confirmed a Superior Court of Québec's decision to dismiss a civil liability action brought by Forcier et Frères Ltée (Forcier) against the Town of Malartic (Malartic).

Forcier was a company that performed extraction activities in Malartic's borrow pit. In the wake of drinking water supply issues, Malartic commissioned experts to identify alternative water sources. In conducting their research, the experts identified an alternative water source located in the borrow pit, which was used by multiple companies, including Forcier. While the water was identified as being of excellent quality, it was susceptible to surface-level contamination. Consequently, Malartic adopted a resolution that it would no longer use gravel from the borrow pit. Malartic also offered that all companies using the borrow pit relocate their activities to another site, 15 km away, and offered to pay them a higher transportation fee, if applicable. Forcier was the only company that refused to co-operate with Malartic and continued operating the borrow pit.

Following Malartic's attempted injunction against all companies refusing to terminate the activities in the borrow pit, Forcier filed a civil liability claim against Malartic, claiming that Malartic was engaging in a "policy of exclusion" against Forcier aimed at forcing it to cease its activities when there was no proof of contamination resulting from such activities. The Court rejected the claim, stating that Malartic (as a public authority) was immune from liability for political decisions. The Court also noted Malartic's actions lacked bad faith, were not irrational actions and were not solely targeted at Forcier. In reaching these conclusions, the Court found the following factors important. First, Malartic's municipal council, which served as the main decision-making body, was composed of members required to act in the public's best interest. Second, the town conducted a lengthy environmental assessment process and considered alternatives. Third, the town considered its financial inability to build a drinking water plant. Finally, the Court found that Malartic's decision was reasonably based on a balance of competing interests that prioritized the need for drinking water over mineral resource extraction in those circumstances.

Article

Resourcing Innovation: Effectively Building Project Teams Utilizing Global Resources

Sarah Adler

Building an an effective team and sourcing the right labour supply are important aspects of any major project, including those in the critical minerals sector. However, the skill set that employers are looking for may not always be available locally. This is particularly so when creating new industry lines that require new processes and methodologies, the skill sets for which may not be readily available in Canada. Labour shortages in Canada — particularly in STEM (science, technology, engineering and mathematics) occupations, including engineers, construction and trades — may also make it difficult to find local employment resources.

Fortunately, Canada has many immigration programs available to bridge these human resource gaps for local mining projects. Workforce requirements for large-scale projects can generally be split into two groups:

— individuals with key skill sets and knowledge that provide threshold information for the success of the project; and

— individuals who provide supporting labour to carry out the day-to-day activities of the project.

Different recruiting and immigration strategies may be required to support these two different operational needs as a lack in resources from either group can grind a project to a halt. In this article, we discuss the programs and tools available to source foreign labour, including tips for planning foreign employment resources for a project, as well as considerations for importing specialized and general skill sets and maintaining the workforce long term.

PROJECT PLANNING WHEN LEVERAGING INTERNATIONAL RESOURCES: THINGS TO THINK ABOUT

Two things are always difficult to recover on a project — time and money. Both of these can be lost with poor international recruitment planning. Immigration is usually the last thing managers think of on a project, but it should be one of the first as it can take significant time to identify and relocate the right talent into Canada and obtain the correct work authorizations.

When planning the human resources required for the project, employers should first consider whether the local economy can support the hiring needs of the project, or if international recruitment will be required to successfully carry it out. A corporate immigration lawyer can help employers plan out potential costs and timelines for international resource needs during the project's planning stages, even before specific employees are identified. This helps the business develop a strong sense of costs and timelines when determining project budgets or startup costs, and it helps set realistic project milestones. This will be exceedingly important if the company has contracts with monetary penalties for delays on project milestones or product delivery. It can also prevent local employees from being unable to work because a key resource failed to arrive in Canada when needed.

Once the business knows what it needs, the next question is where to source it. Some companies with international subsidiaries may be able to find the required specialized resources from within their international organization. They may be able to bring skilled talent into Canada under the federal International Mobility Program (IMP), using the intra-company transferee (ICT) work-permit category.

However, if the company is required to source skills from outside the global organization, it may be required to first obtain a positive Labour Market Impact Assessment (LMIA), which often requires proof of local recruitment efforts in a preliminary-application step with Employment and Social Development Canada (ESDC) before an application for a work permit can even be made. This may add three to four months to the immigration process. Luckily, this application is based on the position and not on the individual worker and therefore can be started before individual workers are selected for the roles.

Regardless of whether the employer needs to first obtain an LMIA or can directly apply for a work permit through the IMP, the location and country of citizenship of the individual to be brought into Canada can affect the processing timelines. Citizens of certain countries will require a Temporary Resident Visa in addition to their work permit, and residents of certain countries will also be required to complete an immigration medical examination.[1] The timelines and costs associated with these factors need to be considered when bringing employees to Canada. The citizenship and location of an individual can add several weeks or even months to work-permit processing times.

If the project in question is operating as a joint venture, the structure may affect access to international resources. To access the ICT program, qualifying companies will need to share a minimum 51% ownership

1 https://www.canada.ca/en/immigration-refugees-citizenship/services/application/medical-police/medical-exams/requirements-temporary-residents.html.

or controlling interest with the foreign company providing the resource.[2] For example, if there is a joint venture between two mining companies needing international resources and the ownership split is 40/60, the company owning 60% can allocate resources to the joint venture under the ICT program, but the company owning 40% may be required to obtain an LMIA for transferring an individual under the same position and work conditions. This can be more complicated when a parent company perceives the joint venture as a project and not as a separate legal business entity because talent may end up being allocated to the wrong business entity, creating breaches in work-permit conditions and immigration non-compliance. This can lead to fines and other immigration penalties, including an inability to sponsor foreign workers in Canada going forward.

In light of the foregoing, the key take-aways for leveraging international recruitment during project planning are:

— plan early;

— know the type of talent you need;

— be strategic; and

— understand your business structures.

Doing the above will save the business time and money, and its people many sleepless nights.

IMPORTING SPECIALIZED SKILL SETS

When specialized skill sets are required, they are often leveraged through a company's existing global talent base when available. If the company has developed similar projects elsewhere, the original creators or development team can transfer their knowledge to other global project sites. In these circumstances, the best immigration tool is the ICT work-permit category under the IMP program. As described above, this program allows the company to temporarily transfer the skill set of an individual for knowledge-sharing purposes.

If for some reason the highly skilled talent required does not qualify for an ICT work permit, it is usually because the individual does not meet the threshold employment requirements with the foreign entity, or the required business relationships don't exist. However, there are other IMP programs that can be leveraged based on extraordinary skill sets that provide an economic, social or cultural benefit to Canada or through immigration exchange programs. For example, a qualifying economic, social or cultural benefit to Canada could be shown by proving that the project creates a new industry line that will generate new revenues and tax bases in Canada, support job creation and provide for potential new export opportunities for Canada. If applicable, any direct environmental benefits that support Canada's endeavour to become a world leader in green technology should be included and supported by details regarding the individual's key contributions to the project and associated credentials.[3]

The immigration portion of many of Canada's free trade agreements can also be easily leveraged to procure engineers and engineering support. Canada currently has immigration agreements with the following countries: United States, Mexico, Chile, Peru and Colombia, as well as others that may facilitate the movement of engineering resources in more specific circumstances.[4]

If all else fails, and the company is required to first obtain an LMIA to support a request for a work permit, the LMIA Global Talent Stream (GTS) program may be utilized to streamline the LMIA process. Specialty skill sets and occupations known to be in demand are specified under GTS — Category B. Relevant to the mining industry, the Category B list currently includes the following occupations:[5]

— mining engineers;

— civil engineers;

— electrical and electronic engineers and technicians; and

— data scientists.

If the project is truly innovative, supported by a referral partner designated by Immigration, Refugees and

2 https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/foreign-workers/exemption-codes/intra-company-transferees/canadian-interests-significant-benefit-qualifying-relationship-between-canadian-foreign.html.

3 https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/foreign-workers/exemption-codes/canadian-interests-significant-benefit-general-guidelines-r205-c10.html.

4 https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/foreign-workers/international-free-trade-agreements.html.

5 https://www.canada.ca/en/employment-social-development/services/foreign-workers/global-talent/requirements.html#h20.

Citizenship Canada (IRCC), and the talent being brought into Canada is a pivotal resource, employers may also apply under Category A of the GTS program, no matter what the position is that would be held in Canada.[6]

There are many benefits to utilizing the GTS program, including expedited processing (approximately 10 business days), an exemption from the requirement to advertise the position and test the Canadian labour market and expedited processing at the visa office. As a result, foreign nationals can be relocated to Canada quite quickly. One drawback, however, is that the company will need to commit to a Labour Market Benefits Plan (LMBP) that shows how they will support the development of their industry locally in order to use this program.[7]

The take-away from the foregoing is that, while there are many programs that can move specialized talent into Canada, the speed at which those programs can be leveraged requires planning and the ability to navigate an increasingly complex immigration system.

IMPORTING GENERALIZED LABOUR SUPPORT

When seeking more generalized labour, it is important to distinguish between skilled and non-skilled labour, both of which can be in short supply in Canada. Canada classifies its workforce under the National Occupation Classification (NOC), which is organized into six TEER (Training, Education, Experience, Responsibilities) levels.[8] TEER 0 is a management level, TEER levels 1-3 are skilled work and TEER levels 4-6 are non-skilled work.

If the position sought is classified as TEER 1-3, an ICT-based work permit can still be obtained, provided that the skill sets needed require proprietary knowledge or experience that is not otherwise available in Canada. If the position sought is classified as TEER 4-6,[9] the business will need to obtain a positive LMIA, likely for low-wage employees. Although this program is available, it comes with significant limitations including:

— that housing, health-care coverage and return flights must be provided by the employer;

— a two-year limitation on work permits; and

— a 20% foreign worker cap on employer's workforce.

For this program, positions must be advertised in the Canadian labour market for a minimum of four weeks. Once the application is filed processing time is currently 10 weeks,[10] plus processing time at the visa post.[11] LMIA applications can be made as bulk requests grouped by position and wage amounts. Note that the LMIA process requires that a prevailing wage for the NOC and location for employment be met.[12]

Many employers recruiting in this space are utilizing third-party recruiting companies. In many provinces, third-party recruiters now require a licence. This will soon include Ontario, where third-party recruiter licensing will be required as of July 2024.[13] When applying for an LMIA, the employer will be asked by ESDC to provide proof of the recruiter's licence. The employer is also required to ensure that the third-party recruiter acts responsibly and that they are not charging applicants for use of their services.[14]

NEW PROJECTS AND KEEPING THE WORKFORCE LONG TERM

Work permits are temporary in nature. While maximum duration caps vary from category to category, the longer a foreign worker has been in Canada, the more difficult it becomes to establish that their intent to reside in Canada is temporary. If a company wants to keep its foreign worker resources long term, it may choose to support them in an application for Canadian permanent residence.

Although permanent residence applications are an individual, and not an employer-driven process, employees will still require employer support when it comes to confirmation of employment letters, arranged employment and business documentation for Provincial Nominee Program applications.

It is generally recommended that employees work in Canada for a least one year before commencing a permanent residence application. This is both a practical recommendation and in some cases a requirement for

6 https://www.canada.ca/en/employment-social-development/services/foreign-workers/global-talent/requirements.html#ust.
7 https://www.canada.ca/en/employment-social-development/services/foreign-workers/global-talent/requirements.html#h2.8.
8 https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/express-entry/eligibility/find-national-occupation-code.html.
9 Note that foreign nationals whose work falls within TEERs 4-5 have very limited options for Canadian Permanent Residence, and it becomes very difficult to keep these resources on a long-term basis.
10 https://www.canada.ca/en/employment-social-development/services/foreign-workers/labour-market-impact-assessment-processing-times.html.
11 https://www.canada.ca/en/employment-social-development/services/foreign-workers/median-wage/low.html.
12 https://www.jobbank.gc.ca/trend-analysis/search-wages.
13 https://www.ontario.ca/page/licensing-temporary-help-agencies-and-recruiters.
14 https://www.canada.ca/en/employment-social-development/services/foreign-workers/global-talent/requirements.html#h2.3.

eligibility. Some permanent residence programs, such as the Canadian Experience Class (CEC), require a minimum one year of Canadian work experience to qualify for the program. Preparing and submitting a permanent residence application involves a significant financial and time commitment, and individuals should be sure they want to remain in Canada before launching an application.

In recognition of the limited availability of engineers in Canada, there are some permanent residence programs specifically targeted to these groups. In 2023, IRCC started issuing invitations to apply (ITAs) under the Express Entry program to individuals in STEM-based occupations,[15] including the following:

— civil engineers;

— electrical and electronics engineers;

— metallurgical and materials engineers;

— data scientists;

— land surveyors; and

— engineering managers.

Various provincial nominee programs also have programs that are specifically geared to the engineering industry. For example, the Ontario Immigrant Nominee Program often selects individuals with engineering skills under both their human-capital-priorities stream and the in-demand-skills stream. The in-demand-skills stream is geared to permanent residence opportunities to those in TEER 4-5 occupations, such as construction trades helpers and labourers[16] and machine operators in mineral and metal processing.[17]

CONCLUSION

Canada has many immigration programs available to help support the human resource needs for the mining and minerals industry in Canada. The key to running a successful immigration program to bring new projects to fruition is to understand your project needs, plan your human resourcing early, and connect with a knowledgeable immigration specialist who understands how to leverage the wide variety of immigration programs to meet both your short- and long-term business needs.

15 https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/express-entry/submit-profile/rounds-invitations/category-based-selection.html#wb-auto-20.

16 See NOC 75110, available at: https://noc.esdc.gc.ca/Structure/NocProfile?objectid=OByuamk%2Fpb5KWXEazKxF%2BJskddvCdBo8jHJBH%2BEkYfE%3D.

17 See: https://www.ontario.ca/page/oinp-employer-job-offer-demand-skills-stream; see also NOC 94100, available at: https://noc.esdc.gc.ca/Structure/NocProfile?objectid=CXQQMjgGg6UVt189%2BBKp0gQHFlmEHvd%2BEid334bU1as%3D.

Case Law Summaries

Securities and Shareholders Disputes

Lindsay Burgess

1843208 Ontario Inc. v. Baffinland Iron Mines Corporation, 2023 ONSC 4906

This was an application to fix the fair value of shares held by a group of dissenting shareholders (Dissent Group) from a plan of arrangement (Plan). The Court rejected the valuation submitted by the Dissent Group and fixed the fair value at C$1.50 per share.

Baffinland Iron Mines Corporation (Baffinland) is an exploration-stage mining company whose principal business is the exploration and development of iron ore deposits located in North Baffin, Baffin Island, Nunavut — known as the Mary River Project. Given its remote location, development of the Mary River Project faced significant infrastructure, operating and capital cost challenges. Lacking the funds to develop the project, Baffinland began to explore its strategic alternatives. In 2010, ArcelorMittal S.A. (AM) and Nunavut Iron Ore Acquisition Inc. (Nunavut) went through several rounds of competing bids to acquire Baffinland that started at C$1.10 per share. In January 2011, AM and Nunavut entered into an agreement to make a joint bid (Joint Bid) to acquire all of the common shares of Baffinland through a new entity, 1843208 Ontario Inc. (208). The Joint Bid was recommended by Baffinland's board of directors and overwhelmingly accepted by its shareholders, with 93%

of the outstanding shares being tendered to the Joint Bid, including the shares held by Baffinland's largest shareholder.

208 acquired the remaining shares in Baffinland pursuant to the Plan, which was approved by the Court on March 25, 2011. The Dissent Group dissented on the resolution to approve the Plan and sought to be paid fair value for their shares. 208 made an offer to the Dissent Group for their shares. That offer was rejected, which resulted in 208 bringing this application. The only issue on the application was the fair value of the shares on the valuation date of March 25, 2011 (Valuation Date). The delta between the parties' submissions on fair value was vast. 208 argued that the fair value was C$1.50 per share, which was the price offered in the takeover bid and supported by 208's expert. The Dissent Group argued that 208 had materially undervalued the Mary River Project and therefore undervalued Baffinland's share price; they relied on a discounted cash flow (DCF) analysis from their expert to support a proposed fair value of C$8.91 per share.

The Court held that the market evidence supported a fair value of C$1.50 per share. In doing so, the Court noted that there is no single formula to apply, and that the determination of fair value is fact specific. Moreover, "evidence of an efficient, open market, consisting of multiple informed participants, is likely the best and most objective evidence of value and is more reliable than theoretical analysis based on assumptions about what a real market might do." Evidence of the value placed on the Baffinland shares by the market, specifically the Joint Bid, was therefore key for the Court. Here, the Joint Bid was not evidence of a distorted market (as argued by the Dissent Group), but rather represented the "culmination of a market process: market participants acting in an economically rational manner in submitting a bid at a value that they are prepared to pay for the shares." To conclude otherwise would be to assume that, had AM and Nunavut not submitted their Joint Bid, the ultimate offer made to Baffinland would have been in excess of the C$1.50 per share figure reflected in the Joint Bid. Not only was there no evidence to support such an assumption, but there was no offer even remotely close to the C$8.91 share price sought by the Dissent Group, nor was there an offer even within the extremely broad range between the values proffered.

Bayliss v. Plethora Exploration Corp., 2023 ONSC 7211

Here, the Ontario Superior Court of Justice granted an order fixing the fair value of Mr. Bayliss' shares in Superior Nickel Inc. (Superior) at C$0.07 per share and requiring Plethora Exploration Group (Plethora) to pay him the fair value of those shares as a dissenting shareholder. Mr. Bayliss' application for an order that Plethora acted oppressively towards him was dismissed.

Superior was a junior mining exploration company focused on exploring for nickel in Manitoba. Mr. Bayliss acquired his shares in Superior by winning a geological competition with a prize of 3% equity in a new company, which became Superior. Mr. Bayliss executed an anti-dilution agreement (ADA) with Superior, which provided that Superior's solicitor was to hold Mr. Bayliss' 900,000 shares in trust in the solicitor's name and vote the shares as directed by Superior's board of directors (Board). The ADA further provided that upon an amalgamation or other "liquidity event," the shares in trust, less any shares over 3% of the total outstanding shares, would be transferred to Mr. Bayliss' name.

Plethora Private Equity (Plethora PE) is a private equity firm based in the Netherlands and was the controlling shareholder of Superior. On October 4, 2022, Plethora PE announced a proposed amalgamation of Superior and three other privately held Ontario companies (Amalgamation) into Plethora, as well as its intent to amend the ADA. Mr. Bayliss executed and returned the amendment to the ADA, which had the effect of making the Amalgamation a "liquidity event" under the ADA. On February 27, 2023, Mr. Bayliss received a notice from Superior advising him that a meeting of the Superior shareholders was being convened to vote on a resolution to approve the Amalgamation. Mr. Bayliss sent a notice of dissent to Superior. The Amalgamation was approved by resolution on March 23, 2023. Plethora took the position that Mr. Bayliss was left with 423,471 shares immediately prior to the Amalgamation, being 3% of the total and outstanding shares of Superior, the fair value of which on March 23, 2023 was zero, and it offered him C$1,000 as a "gesture of goodwill." Mr. Bayliss commenced this application in response.

The Court largely found in favour of Mr. Bayliss. Plethora argued that Mr. Bayliss was not entitled to dissent against the Amalgamation under s. 185(1) of the *Ontario Business Corporations Act* (OBCA) on the basis he was not a voting shareholder pursuant to the terms of the ADA, which provided that his shares were to be held in trust and voted as directed by the Board. However, the Court found that Superior did not follow the provisions of the ADA and did not register the shares in the name of its solicitor. Rather, the evidence — including the proxy form circulated to Mr. Bayliss in the information circular in advance of the vote to amalgamate — demonstrated that 900,000 Superior shares were issued in Mr. Bayliss' name. Mr. Bayliss was thus entitled to vote on the Amalgamation, giving him the statutory right to dissent. Moreover, the Court found that Mr. Bayliss' right under the OBCA as a dissenting shareholder to receive fair value for his shares attached to all 900,000 shares issued to him. In this regard, the Court rejected Plethora's argument that the ADA limited Mr. Bayliss' entitlement to 423,271 shares. Although the ADA permitted Superior to issue the shares to Mr. Bayliss in trust, it failed to follow the terms of the ADA and, instead, issued the shares to him directly. The Court ultimately fixed the fair value of the shares at C$0.07 per share after considering competing expert reports and discounting to account for changes in the macroeconomic environment leading up to the Amalgamation. Finally, the Court dismissed Mr. Bayliss' application for an oppression remedy in respect of Plethora's response to his notice of dissent. The Court found that the Board had exercised its business judgment in a responsible way. In this regard, the Court accepted the evidence from Plethora's witness that explained how the Board arrived at a fair value of zero.

Ren v. Eastern Platinum Limited, 2023 BCSC 404 and 2023 BCSC 706

In these decisions, the Supreme Court of British Columbia granted an application for leave to commence a derivative action against the former CEO of Eastern Platinum Limited (EPL) framed in negligence and breach of fiduciary duty.

EPL, a B.C. public company, owned the right to conduct mining operations at a platinum and chrome mine in South Africa (Mine) through a subsidiary. The petitioner, Ms. Ren, a shareholder of EPL, alleges that the present and former directors of EPL acted negligently and in breach of their fiduciary duties by causing the company to enter into agreements with Union Goal Offshore Limited (Union Goal) for the exploitation of mine tailings at the Mine. Ms. Ren contends that EPL suffered loss as a result of the agreements and sought leave to commence a derivative action under s. 232 of the B.C. *Business Corporations Act* in EPL's name against the directors. Ms. Ren's initial draft claim named seven defendants and was based in negligence (against all directors) and breach of fiduciary duty (against Ms. Hu only). EPL opposed the application on the basis it was simply a different version of the same application that had been dismissed in *2538520 Ontario Ltd. v. Eastern Platinum Limited*, **2019 BCSC 1446** (Hong Proceeding) and upheld by a majority of the Court of Appeal in **2020 BCCA 313**,[1] and, therefore, it was an abuse of process. In the alternative, EPL argued that Ms. Ren had not satisfied all statutory prerequisites to her application.

The Court held that Ms. Ren's application was not an abuse of process. First, the application for leave to commence a derivative action in the Hong Proceeding failed on a basis personal to the petitioner in that case. Second, Ms. Ren's draft claim advances allegations of breach of fiduciary duty that were not included in the Hong Proceeding. These new allegations were added by Ms. Ren after receipt of a copy of a resignation letter from a senior officer of EPL's subsidiary (Lubbe Letter). The Lubbe Letter alleges that Ms. Hu, the former CEO of EPL, was in a conflict of interest as a result of her relationship with EPL's controlling shareholder, Ka An Development Co. Ltd. (Ka An), and Union Goal, and that in her role as CEO, she directed the negotiations with Union Goal contrary to EPL's interests. The letter further alleged that Ka An and Union Goal were related and that benefits to Union Goal would ultimately benefit Ka An by allowing Ka An to increase its ownership interest in EPL. In her draft claim, Ms. Ren alleged that Ms. Hu was acting in the best interest of Union Goal and Ka An in breach of the fiduciary duty Ms. Hu owed to EPL, based on information contained in the letter.

With respect to the test for leave to commence a derivative action, the Court held that it was in the best interests of EPL to pursue a claim against Ms. Hu for negligence and breach of fiduciary duty but to abandon the negligence claim for the other defendants. In this regard, the Court found that the Lubbe Letter provides a reasonable evidentiary foundation against Ms. Hu for breach of fiduciary duty. The Court also found that the proposed claim in negligence has a reasonable prospect of success, although it is substantially weaker than the breach of fiduciary duty claim against Ms. Hu and the business judgment rule "remains a formidable obstacle." The Court also found that Ms. Ren brought the application for leave in good faith. Ms. Ren amended her draft claim to take into account the Court's initial ruling, and the Court granted leave to commence a derivative action against Ms. Hu in supplementary reasons.

EPL has appealed, which remains pending before the B.C. Court of Appeal.

1 Application for leave to appeal to SCC refused: 2021 CanLII 44590 (SCC). We discuss the B.C. Court of Appeal's decision in ***Mining in the Courts, Vol. XI***.

Swan v. Nickel 28 Capital Corp., 2023 BCSC 1262

In this decision, the Supreme Court of British Columbia considered competing petitions to determine who would be up for election as directors of Nickel 28 Capital Corp. (Nickel). The Court held that the nominations by the board of directors (Board) should be put forward as there was no basis to interfere with the Board's decision.

Nickel is a public company and producer of nickel and cobalt through various mines around the world. Pelham Investment Partners LP (Pelham) is a U.S.-based private investment limited partnership and shareholder of Nickel. At the heart of the dispute was Pelham's attempts to gain control of the Board in the spring of 2023, first through a proposed private placement and then through an offer to acquire up to 10 million common shares on terms that allowed Pelham to acquire proxies for any related votes in meetings called before the offer closed (Tender Offer). Nickel rejected these offers on the basis they were not in the best interests of Nickel or its stakeholders and were simply an attempt to gain control of the Board without paying a premium.

On April 24, 2023, Nickel filed a notice to hold its annual general meeting (AGM) on June 12, 2023, with the record date of the meeting to be April 24, one day before the expiry of Pelham's Tender Offer. Shareholders who want to nominate directors to the Board at an AGM must comply with the requirements of s. 10.12 of Nickel's articles (Articles), which includes providing written notice that discloses, among other things, any proxies, contracts or agreements relating to the voting securities of Nickel. Pelham delivered its advance written notice on May 4, 2023 (Pelham Notice) and nominated five directors.

On May 11, 2023, Nickel appointed Maurice Swan as the independent chair of the AGM. Mr. Swan noted the Pelham Notice stated it had no proxies, despite the terms of the Tender Offer. Mr. Swan asked Pelham to confirm whether it had terminated its proxies gained from the Tender Offer. Pelham explained that it held proxies for 3,663,478 common shares, but nevertheless its disclosure was appropriate and at worst the errors were immaterial and inadvertent. Mr. Swan disagreed. He determined that the Pelham Notice did not meet the requirements of s. 10.12 of the Articles and therefore Pelham's slate of directors would not be considered at the AGM. Pelham asked the Board to consider waiving the advance notice; however, after deliberation, the Board refused to do so. The parties then brought competing petitions before the Court. Pelham sought, among other things, an order that its slate of nominee directors be considered at the AGM and a direction that the Board waive the requirement for advance notice. Mr. Swan sought a declaration that Pelham's advance notice did not comply with the requirements of s. 10.12 of the Articles such that its nominees need not be considered at the AGM.

The Court dismissed Pelham's petition and granted the relief sought by Mr. Swan. While s. 186 of the B.C. *Business Corporations Act* (BCA) provides the Court with the power to grant orders and directions regarding shareholder meetings to ensure the best interests of the company, justification is necessary for court intervention. Here, the Court found that the Board had properly exercised its business judgment in the best interests of Nickel by declining to waive the advance notice. Furthermore, there was no evidence that the Board had manipulated its situation, nor did Pelham allege a breach of the BCA, the Articles or any fiduciary duty. The Court also refused to grant any relief under s. 227(3) of the BCA or oppression or unfairly prejudicial acts. The Court disagreed with Pelham's main criticism of the exercise of the Board's discretion — that it was unfair, unreasonable and technical. Pelham made a material misrepresentation in its advance notice and failed to follow the requirements of the Articles. The Board's response was reasonable.

Case Law Summaries

Surface Rights and Access to Minerals

Daniel Siracusa

Skeena Resources Ltd. v. Mill, 2023 BCCA 249

The British Columbia Court of Appeal granted leave to Skeena Resources Ltd. (Skeena) to appeal the British Columbia Supreme Court's decision in *Skeena Resources Ltd. v. Mill*, **2022 BCSC 2032**, in which the court held Skeena lost its interest in mined materials once placed in a tailings facility. The appeal will have broad implications for the mining industry, including that it will clarify property interests in mined materials under British Columbia's *Mineral Tenure Act* (MTA) and *Land Act*.

As we reported in ***Mining in the Courts, Vol. XIII*** in 2023, the British Columbia Supreme Court upheld the chief gold commissioner's decision that Skeena lost its mineral rights over previously mined material once deposited off-site into Albino Lake. It found that mineral ownership rights do not travel with minerals that change location. Rather, Skeena's rights reverted to the Crown when Skeena moved the minerals to Albino Lake and were later acquired by the respondent, Mr. Mill. Skeena now has leave to appeal the British Columbia Supreme Court's decision.

In granting leave to appeal, the Court recognized that delineating personal property interests in deposited materials under the MTA and *Land Act* is an issue of general importance to the resource extraction industry, particularly as developments in metallurgical extraction and price changes have made reworking old deposits profitable.

Terra Energy Corp. (Re), 2023 ABKB 236

Here, the Alberta Court of King's Bench rejected the Alberta Department of Energy's (Alberta Energy) attempt to recover oil and gas royalty arrears owed to the Crown by Terra Energy Corp. (Terra) from Enercapita Energy Ltd. (Enercapita) (the successor in interest of Terra's leases). The Court interpreted s. 91.1 of Alberta's *Mines and Minerals Act* (MMA) narrowly: it applies only to royalty liabilities existing when a Crown lease is transferred, not liabilities arising after the lease is transferred.

In November 2015, Alberta Energy approved the transfer from Terra to Enercapita of certain oil and gas leases encumbered by Crown royalties. In November 2016, Terra went bankrupt. Alberta Energy then audited Terra's royalty filings. As part of the audit, it asked for supporting documentation for Terra's cost allowances claimed from 2011 to 2014. No documentation was provided, so Alberta Energy rejected all of Terra's "allowable costs." The Crown concluded Terra owed C$3.2 million in royalty arrears, which it demanded from Enercapita as the successor. Alberta Energy's demand stemmed from s. 91.1 of the MMA, which provides that liabilities under an agreement that pre-existed the transfer of the agreement continue after the transfer. Also, as Alberta Energy owed Enercapita C$1.2 million for royalty overpayments, it purported to rely on s. 46(4) of the MMA to set off the overpayments against Terra's arrears.

Enercapita and Alberta Energy negotiated and discussed Terra's claimed cost allowances for years, but in December 2020 Alberta Energy issued its final decision refusing to refund Enercapita's overpayments.

Enercapita challenged the final decision in Court. It argued that Alberta Energy had not established its calculation of Terra's arrears, and even if it had, it disproportionately attributed the arrears to Enercapita. Further, it argued that its royalty overpayments were separate and could not be set off against Terra's arrears. Alberta Energy argued that the royalties underlying Terra's arrears existed when Enercapita purchased the Terra assets and therefore transferred with them under s. 91.1.

Enercapita's position prevailed. The Court agreed that s. 91.1 does not apply to liabilities that did not exist at the time of transfer. When Alberta Energy approved the transfer of the leases, no arrears were outstanding; there were only contingent liabilities. Alberta Energy could have audited Terra before approving the transfer. It did not. The Court noted that accepting that Alberta Energy could collect royalties from Enercapita would increase risk in oil and gas transactions and needlessly strain the industry.

The Court also found that even if s. 91.1 allowed Alberta Energy to recover Terra's arrears from Enercapita, Alberta Energy was not entitled to set off the arrears under s. 46(4) as it failed to establish that Enercapita owed the arrears. The Court ordered Alberta Energy to refund Enercapita's royalty overpayments.

Article

Whose Patent is it Anyway? Secure Energy Faces Employee Inventorship and Ownership Dispute

Timothy St. J. Ellam, Steven Tanner, Meena Alnajar and Kendra Levasseur

Ensuring your intellectual property (IP) contracts are watertight is key to avoiding lawsuits. Businesses often expect that they cannot successfully be sued for patent infringement if the patent was obtained based on their employees' work. Worse, businesses often assume that if they finance the work, it results in a patent they will own or co-own. These expectations can be proved false, as Secure Energy Inc. learned.

In 2018, Mud Engineering Inc. sued Secure Energy for patent infringement in respect of multiple patents. Secure Energy claimed two patents were developed pursuant to an employment contract with Mr. Wu, who had subsequently left Secure Energy to form Mud Engineering. Secure Energy defended the action in part on the basis that it owned (or co-owned) those patents.

In a summary trial, Mud Engineering sought a declaration that it was the sole owner of the disputed patents, while Secure Energy sought a declaration that it owned or co-owned the disputed patents. Both parties lost. Justice St-Louis held that neither side had met its respective burden to establish that they were the owner (or co-owner) of the disputed patents. Justice St. Louis dismissed the motion for summary trial on that basis.

This decision serves as an important reminder to companies that employ individuals — including contractors who develop and patent inventions — that they need to ensure their employment agreements are clear as to the ownership of all intellectual property developed in relation to the employment. Employers should also consider negotiating covenants not to sue for later acquired patents, regardless of the outcome of any ownership dispute.

Mud Engineering Inc. v. Secure Energy (Drilling Services) Inc., 2022 FC 943 (CanLII)

Mud Engineering brought a motion for a summary trial seeking a declaration that certain patents at issue in the action are owned by Mud Engineering and dismissing Secure Energy's ownership counterclaim for Canadian Patent Nos. 2,635,300 and 2,725,190 (the Disputed Patents).[1] The Disputed Patents related to drilling fluid compositions for drilling bitumen recovery wells in oilsands.[2]

The Court was asked to answer two key questions: is Mud Engineering entitled to the sole ownership declarations it sought? If not, is Secure Energy entitled to be declared an owner or co-owner?

Before it could begin its substantive analysis, the Court was required to decide the threshold issue of whether it was appropriate to decide an ownership dispute in a summary trial.[3] The Court held it was.[4] As the Court explained, if Secure Energy was successful in obtaining the ownership declaration it sought, then the underlying action in respect of the Disputed Patents would have been dismissed. Asking for a determination on this issue avoided potential months or years of litigation required to prepare for a full trial before knowing the ownership status of the patents.

The Court also considered whether the (co-)inventor of the Disputed Patents, Mr. Wu, came up with the inventions while employed by Secure Energy's predecessor company. Mr. Wu had signed a non-solicitation and confidentiality agreement, which specified that any intellectual property he developed in the course of his employment belonged to that company. However, he left the company in September 2006,[5] incorporated Mud Engineering in July 2007 and filed the Disputed Patents in, respectively, June 2008 and December 2010.[6]

Secure Energy did not challenge Mud Engineering's evidence that Mr. Wu did not work on drilling fluids before September 2006.[7] Instead, it led evidence showing what Mr. Wu worked on while employed by its predecessor company, which the Court found sufficient to displace the presumption that Mr. Wu is the true inventor.[8] The Court

1 ***Mud Engineering Inc. v. Secure Energy (Drilling Services) Inc., 2022 FC 943*** at para. 2.
2 ***Mud Engineering*** at para. 60.
3 In reaching its decision, the Court was also asked to weigh in on evidentiary issues. It held Mud Engineering bore the burden to prove that a summary trial was appropriate, while Secure Energy nonetheless bore the burden to make out its ownership claim.
4 ***Mud Engineering*** at para. 40.
5 ***Mud Engineering*** at para. 51.
6 ***Mud Engineering*** at para. 43.
7 ***Mud Engineering*** at para. 69.
8 ***Mud Engineering*** at para. 82.

held that Mr. Wu did "not come across as a direct, sincere and candid fact witness,"[9] and Mud Engineering produced almost no evidence to substantiate the work done by Mr. Wu.

The Court dismissed Mud Engineering's motion for a summary trial because it did not meet its burden to establish that Mr. Wu was the sole inventor and thus that Mud Engineering was the sole owner of the Disputed Patents. The underlying action was also dismissed since the Court concluded that Mud Engineering was required to put its "best foot forward" to establish its ownership right in the summary trial but failed to do so. In respect of Secure Energy's responding argument that it was an owner (or co-owner) of the Disputed Patents, the Court was also not convinced that Secure Energy is the owner,[10] leaving the Disputed Patents in a state of limbo. This decision is now under appeal.

Secure Energy (Drilling Services) Inc. v. Canadian Energy Services L.P., 2023 FC 906 (CanLII)

Soon after this decision was released, Secure Energy received a decision on another, separate application to correct the ownership and inventorship of a patent relating to drilling fluid used in the oilsands drilling process.[11] This decision is now also under appeal. This application related to a patent which, according to the patent register, was owned by Canada Energy Services LP (CES) and invented by John Wanek.[12] CES brought an action in February 2018 asserting that Secure Energy infringed this patent as well, but Secure Energy used a different strategy in response than it had against Mud Engineering — it brought this separate application on ownership.

Again, Secure Energy alleged that a former employee of its predecessor company, Levey, came up with the invention while working for the predecessor company. According to CES, the named inventor Wanek came up with the invention a few days after leaving that company.[13] However, in this case, Secure Energy prevailed. Levey's evidence was key to this decision — he was able to support his testimony with notebooks and clear recollections as to how he came to the idea of the invention.[14] The difference in how the Court reacted to this evidence compared to Mr. Wu's lack of evidence of the actual work he did highlights the importance of clear record-keeping when it comes to IP rights.

TAKE-AWAYS

This case provides a cautionary tale. Secure Energy had to contend with costly patent litigation for years in respect of patents it could not prove that it owned. A clearer employment agreement relating to the ownership of patents, including a broad covenant not to sue, could have avoided this litigation or brought it to a quicker resolution.

This case also serves as a warning for patentees who are unable to trace their ownership rights to the patent. Mud Engineering's aggressive summary trial motion seeking a declaration of ownership backfired when it did not have the evidence to support its claim.

9 ***Mud Engineering*** at para. 94.
10 ***Mud Engineering*** at para. 146.
11 ***Secure Energy (Drilling Services) Inc. v. Canadian Energy Services L.P.*, 2023 FC 906 (CanLII)** at para. 1.
12 ***Secure Energy*** at para. 3.
13 ***Secure Energy*** at para. 47.
14 ***Secure Energy*** at para. 52.

Case Law Summaries

Tax

Lindsay Burgess, Konstantin Sobolevski and Charles-Etienne Presse

Municipal Property Assessment Corporation et al. v. County of Wellington, 2023 ONSC 591

This was an appeal under the Ontario *Assessment Act* (Act) regarding the Assessment Review Board's (Board) classification of land use as "industrial" rather than "residential" in the context of aggregate-mining properties. The Court held that the Board's decision (Decision) to classify more land used for gravel pit operations as industrial (which is taxed at a higher rate than residential land) was correct in law and dismissed the appeal.

The Municipal Property Assessment Corporation's (MPAC) land value assessment methodology was at issue. The County of Wellington (County) commenced 50 appeals of

the land-use classification on behalf of three municipalities for the 2016 assessment cycle, arguing that MPAC's formula did not accurately determine the value of the land in accordance with the legislation because the lands were improperly classified. The parties agreed that six appeals would be heard as representative appeals. The key issue on appeal to the Board was what portion of the gravel pit properties should be classified within the industrial class under ss. 6(2)2.2-2.3 of the O. Reg. 282/98 (Regulation), which includes:

(i) 6(2)2.2: The portion of land licensed or required to be licensed under Part II of the *Aggregate Resources Act*, or that would be required to be licensed if designated under s. 5 of that Act, and which is used for: extracting anything from the earth, excavating, processing extracted or excavated material, stockpiling extracted or excavated material, or stockpiling overburden; and

(ii) 6(2)2.3: Roadways or structures on a portion of land licensed or required to be licensed under Part II of the *Aggregate Resources Act* that is used in connection with the activities in (i).

The Board noted that s. 6(2)2.2 referred to "the portion of" land being used for the activities of operating a gravel pit, rather than "the land," as used in other provisions. The Board found that this was a "key difference" in the classification treatment of licensed versus unlicensed lands. The words "the portion of" land allowed a split classification of land for licensed land in the industrial class and unlicensed land outside of the industrial class. The Board further found that the gravel pit activities listed in s. 6(2)2.2 of the Regulation were intended to include "activities that are integral to the [extraction] operation," including extracting, excavating, processing and stockpiling. These activities should not be interpreted in isolation — whether land is being "used for" an activity should be considered in the context of the overall mining operation. Ultimately, the Board's Decision resulted in more land being classified as industrial. MPAC and the owners of the aggregate properties at issue (Owners) appealed the Decision to the Superior Court.

The Court dismissed the appeal, finding that the Board's conclusions were based in the evidentiary record and consistent with the statutory scheme and the "reality of gravel pit operations." MPAC and the Owners had argued that the activities in s. 6(2)2.2 should be interpreted narrowly, capturing only lands specifically "in use" for the listed activities, which they defined as lands on which an excavator, stockpile or processing equipment are located, and excluding lands that are primed for excavation or essential in the process of excavating, extracting, stockpiling or processing. The Court disagreed, noting that the legislation does not contain the language "in use," but rather "used for." The Court held that the Board correctly relied on evidence that established that excavation takes place on an ever-shifting area of land and that land may be rehabilitated on a rolling basis — which was relevant industry context for determining what the land was being "used for."

The Court also disagreed with the appellants' argument that land which has only been partially extracted, not yet rehabilitated and being held in that state for extraction, and which has no other competing legal use, should not be included in the industrial class. The Court held that to interpret s. 6(2)2.2 in that way would result in a "free ride" to the Owners by allowing them to avoid their fair share of property taxes and benefit from a lower tax class despite engaging in an active aggregate mining operation.

SCR Holdings Inc. v. Ontario (Minister of Finance), 2023 ONSC 6244

In this decision, the Ontario Superior Court clarified the scope of the Ontario Manufacturing and Processing Profits (MPP) tax credit under s. 43 of the Ontario *Corporations Tax Act* (Act).

SCR Holdings Inc. (SCR) is an Ontario company that provided contract mining services. During the taxation years at issue (2007 and 2008), SCR provided contract work almost exclusively to Vale in underground mines owned by Vale in the Sudbury basin. SCR's work pertained primarily to essential underground mine infrastructure, such as ventilation, electrical and ore chutes. SCR had no discretion outside of its scope of work without Vale's approval in writing, had no authority over Vale employees and did not use Vale equipment. SCR claimed the MPP tax credit on its 2007 and 2008 tax returns. The Minister of Finance disallowed the tax credits and reassessed SCR. SCR appealed the reassessments.

The Court dismissed the appeal. The MPP tax credit is only available to corporations that had "eligible Canadian profits," which in the circumstances of this case required SCR to have "mining profits" for the taxation years in issue. "Mining profits" is defined in s. 505 of *RRO 1190, Reg. 183* issued under the Act as the corporation's income for the taxation year from: (i) the production and processing of ore from a mineral resource operated by it; or (ii) the processing of ore from a mineral resource not operated by it. Applying a contextual and purposive approach, the Court found that SCR's operations did not meet this test. With respect to the first part of the definition, SCR was not an "operator" of the mineral resources at which it worked. An "operator" of a mineral resource is "one who controls the working of it or directs the operation of it." SCR did not meet this definition with respect to its contract work at the Vale mines. With respect to the second part of the test, SCR's income did not flow from processing ore. Rather, its income was from the construction of infrastructure for the production of ore at the mine.

Sparwood (District) v. Teck Coal Limited, 2023 BCCA 353

In ***Mining in the Courts, Vol. XIII***, we reported on the Supreme Court of British Columbia's decision in *Teck Coal Limited v. Assessor of Area #22 – East Kootenay* (BCSC Decision),[1] in which the Court found that the Property Assessment Appeal Board of British Columbia (Board) erred in its classification of two water treatment facilities (WTFs) built by Teck Coal Limited (Teck) at its Sparwood and Elkford locations to address selenium contamination. The Board found that the WTFs are not directly used to mine, break, wash, grade or beneficiate coal, and as such are not a functional or operational requirement of coal mining. Accordingly, the Board held that the WTFs are not part of an "industrial improvement" as defined in the *Assessment Act* (Act) and as used in the *Prescribed Classes of Property Regulation*, and instead should be properly classified as Class 6 – Business & Other. The Supreme Court disagreed, finding that there was a sufficient degree of physical, functional and operational integration between the WTFs and their respective mines to render them "part of" those mines such that a Class 4 – Major Industry classification was justified in the circumstances.

The districts of Sparwood and Elkford sought leave to appeal the BCSC Decision to the B.C. Court of Appeal, but their application for leave was dismissed (Leave Order). They then sought to vary or discharge the Leave Order under s. 29 of the *Court of Appeal Act*. The B.C. Court of Appeal dismissed that application, finding that the appeal judge made no error in her application of the test for leave and that the reasons given for the Leave Order were sufficient when taken in context.

1 **2022 BCSC 2013**.

Ville de Saguenay c. Niobec inc., 2023 QCCA 1219

In *Ville de Saguenay c. Niobec inc.*, a case dealing primarily with the standard of judicial review of administrative decisions, the courts looked into whether inlet and outlet water pipe systems supplying and discharging water to and from a niobium processing facility are immovables for municipal tax purposes under the Québec regime.

Niobec inc. (Niobec) operated an industrial complex, including an underground niobium mine and a concentrator that processed niobium into ferroniobium (a substance used in steelmaking, among other things). The concentrator and niobium processing (though not the part of the process that converted niobium into ferroniobium) required substantial amounts of water, so Niobec drew fresh water from the Shipshaw River through a 10-km inlet pipe. The pipe supplied 20% of the water required for the concentrator, the remaining 80% was recycled water. After the water was used in the concentrator and decontaminated, it was returned to the Shipshaw River through an outlet pipe. The inlet and outlet pipe systems were trenched together and crossed public land belonging to the city of Saguenay (Saguenay).

Saguenay considered the pipe systems were "immovables" under the *Act Respecting Municipal Taxation* (Québec) (Taxation Act) and registered them on their property assessment rolls. Niobec contested this decision, claiming that the pipe systems and their components were exempt from taxation as "machines, apparatus and their accessories which are used or intended for the purpose of the abatement or control of pollution … that may result from industrial production or for the purpose of monitoring such pollution."

The Court of Appeal of Québec ruled that the exemption in the Taxation Act did not apply to the pipe system because the system did not have an "active role in industrial production," as required by the case law interpreting the language of the exemption.[2] The fact that water was an essential element in the niobium transformation process (at the processing stage) did not automatically make the system supplying it an integral part of industrial production. The system, therefore, did not play an active role in the production because they did not participate in the niobium conversion process.

2 *Saint-Basile, Village Sud (Corporation municipale de) c. Ciment Québec Inc.*, **1993 CanLII 108** (CSC), [1993] 2 R.C.S. 823.

Case Law Summaries

Torts

Daniel Siracusa

Beets v. Cowan, 2023 YKSC 21

In this decision, The Supreme Court of Yukon dismissed a claim for conversion of pontoons removed from a dredge (Dredge) located on a mining claim (Claim) near Henderson Creek, Yukon. The court found the Dredge had been abandoned long before the plaintiff purported to buy it in 2015 and, hence, he had no interest in it and no claim in conversion.

The Dredge was first owned by Yukon Gold Placer Ltd. before being transferred to Queenstake Resources Ltd. (Queenstake). Queenstake mined the Claim until the late 1980s and, after that, amalgamated with Veris Gold Corp. (Veris). Veris never mined the Claim. In 2015, Veris sold the Dredge to the plaintiff, Anto Beets, a placer miner.

The plaintiff alleged that the defendant, Hayden Cowan, also a placer miner, removed seven pontoons from the Dredge. The plaintiff sued the defendant for conversion (i.e., the wrongful interference with chattels). The defendant admitted taking the pontoons but asserted that the Dredge had been abandoned by its previous owner.

"Abandonment" is a defence to conversion. The party asserting it must establish the owner's intent to abandon the chattels. Relevant factors include the passage of time, the nature of the property and the conduct of the owner.

The Court held the "passage of time" was lengthy Queenstake had abandoned the Dredge long before 2015. The plaintiff testified that the Dredge was disassembled and left in pieces in the 1960s, after Queenstake stopped mining the Claim. The Court's conclusion also found support in the "nature of the property" factor: dredges are obsolete, without value, and, as they are large, the expense required to transport one even for salvage would be substantial. Likewise, for the "conduct of the owner" factor: Queenstake did nothing to use or maintain the Dredge after the 1980s.

The Court concluded that because Queenstake abandoned the Dredge, it could not have transferred its interest in it to Veris and, in turn, Veris had no interest to transfer to the plaintiff. The plaintiff's conversion claim failed.

Christman v. Lee-Sheriff, 2023 BCCA 363

The British Columbia Court of Appeal dismissed this appeal of an anti-SLAPP application under B.C.'s *Protection of Public Participation Act* (PPPA) brought by the Yukon's chief mine engineer to dismiss defamation claims brought against him by Janet Lee-Sheriff and Golden Predator Mining Corporation (Golden Predator). The Court clarified that the PPPA will not protect a defendant that denies making the expression that is alleged to be defamatory on the basis that the lawsuit's intent is to silence public participation.

The dispute arose from events at the 2020 Vancouver Resource Investment Conference. Ms. Lee-Sheriff was then CEO of Golden Predator; Mr. Christman was chief mine engineer with the Yukon government. Ms. Lee-Sheriff and Golden Predator alleged that Mr. Christman slandered them by loudly and publicly berating Ms. Lee-Sheriff during and after her presentation about Golden Predator at the conference. They sued him for damages stemming from his allegedly defamatory and slanderous comments.

Mr. Christman applied to dismiss the lawsuit under the PPPA, arguing it aimed to stifle public challenge to Golden Predator's operations. The PPPA enables the court to summarily dismiss "strategic lawsuits against public participation" (or SLAPPs) on the basis that public interest in protecting expression outweighs allowing the lawsuit to proceed. The applicant must show the lawsuit arises from their expressions on a matter of public interest. The burden then shifts to the respondent to show the lawsuit has substantial merit and no valid defence.

The chambers judge dismissed Mr. Christman's application. She found Mr. Christman failed to discharge his threshold burden with respect to one of the impugned expressions because he denied making it. As to the other expressions, she found Mr. Christman's defences were not tenable or supported by the evidence. Also, she concluded that Mr. Christman's expressions were published based on an affidavit attesting that potential investors overheard the expressions, and that the public interest would not be served by protecting the expressions at the expense of the lawsuit.

On appeal, the Court rejected Mr. Christman's argument that he could benefit from the PPPA's protection for expressions that he denied making. The PPPA's wording and purpose require acknowledgment of the impugned expression; if an applicant denies having made it, there is no public participation to protect. As to the other expressions, the Court rejected Mr. Christman's argument that the chambers judge relied on hearsay evidence in finding that the expressions were published. A PPPA application is a preliminary screening device; a full admissibility analysis should await trial.

In dismissing the appeal, the Court underscored that the PPPA protects public participation in debate by filtering out defamation suits aimed at silencing or intimidating others. It concluded that Mr. Christman's expressions were not of the kind that the PPPA is designed to protect because they were made in a highly public setting and couched in aggression, profanity and gendered language. Rather, the expressions would tend to diminish the stature of Ms. Lee-Sheriff, a female executive in a male-dominated industry, especially when uttered by someone with official status who could be seen as representing the Yukon government.

About McCarthy Tétrault

McCarthy Tétrault is a Canadian law firm that offers a full suite of legal and business solutions to clients in Canada and around the world. We deliver integrated business, litigation, tax, real property, and labour and employment solutions through offices in Vancouver, Calgary, Toronto, Montréal, Québec City, New York and London, U.K. Our industry knowledge and integrated national platform ensure we help build our clients' competitive advantage.

Our Global Metals & Mining Group has been at the forefront of multi-jurisdictional mergers and acquisitions, alternative financing structures, major project developments and high stakes litigation. The team includes lawyers with in-house experience at some of the largest global mining companies, providing a real world perspective on domestic and international business approaches and solutions for our clients.

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, the transportation and logistics industry, 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
- Corporate Governance
- Cyber, Data & Privacy Law
- Environmental Law
- Environmental and Health and Safety Prosecutions
- Intellectual Property
- International Trade & Investment Law
- Labour & Employment
- Mergers & Acquisitions
- Global Metals & Mining
- Private Equity & Venture Capital
- Procurement
- Professional Responsibility
- Real Estate & Real Property
- Regulatory
- Securities
- Tax
- Toxic Torts
- Transportation & Logistics

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

Canada's Top 100 Employers 2023

2023 CANADA'S BEST DIVERSITY EMPLOYERS

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 MZ400
1000 De La Gauchetière Street West
Montréal, QC H3B 0A2

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

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

LONDON
1 Angel Court, 18th Floor
London EC2R 7HJ
United Kingdom