Mining in the Courts
Year in Review

Vol. XI - March 2021

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

Welcome to the 11th 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.

When we released our 10th anniversary edition last year we may not have been envisioning a year of celebration for the industry, but we were certainly hopeful. Little did we know that the world would change dramatically due to the COVID-19 pandemic.

Fortunately, many in the Canadian mining industry have fared well during the pandemic. Although a number of operations were scaled back, the industry carried on as an essential service and quickly adapted to the "new normal." The price of gold soared, and M&A activity continued. And despite the lockdowns and radical changes in how we access courts in Canada, there were a number of cases decided in 2020 that directly involve, or impact, the mining industry. The industry has been front and center on a number of developments across many different areas of law, including contract law, constitutional law, environmental law, labour and employment, and shareholder disputes. Many of these cases are summarized inside this publication, allowing you to see the impact you have had on the development of Canadian law.

In addition to providing summaries of many of the most important cases impacting the mining sector, this edition contains articles with our insights on current legal trends and what we think the industry can expect to face in the coming year. Noteworthy articles include Shifting with the Winds of Change: Update on Climate Change Disclosure in the Metals and Mining Sector (pg. 42) and Recent Developments in Intellectual Property Litigation in the Mining Sphere (pg. 61). The resilience and adaptability of the mining sector is highlighted in Workforce Health and Safety Considerations for the Mining Industry in the Wake of COVID-19 (pg. 54).

We hope you find this edition of *Mining in the Courts* useful, and that it serves as a reminder that, despite everything, it is business as usual for McCarthy Tétrault's Mining Litigation Group. We're here when you need us most.

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A very special thank you to Assistant Editors Lindsay Burgess and Kathryn Gullason. We also thank all of our other contributors who are noted throughout the publication, and our student contributors Robert Celac, Sarah Chiavarini, Alexandra Comber, Lindsay Frame, Will Fraser, Nishant Jain, Heather Mallabone, Quentin Peres, RJ Reid, Alexandra Simard, and Sarah Tella.

Case Law Summaries

Aboriginal Law

Bryn Gray, Selina-Lee Andersen and Lindsay Burgess

Consultation is Not Assessed According to a Standard of Perfection

The highest profile duty to consult case this past year was the Federal Court of Appeal's decision in *Coldwater First Nation v. Canada (Attorney General)*, 2020 FCA 34, relating to the Trans Mountain Pipeline Expansion Project (TMX Project). This was a judicial review of the federal Cabinet's decision to approve the TMX Project for the second time subject to numerous conditions. The TMX Project involves the twinning and expansion of an existing pipeline from Edmonton, Alberta to Burnaby, British Columbia. It would increase capacity from 300,000 to 890,000 barrels a day and the number of tankers from five to 34 per month.

The first Cabinet decision was previously set aside by the Federal Court of Appeal in *Tsleil-Waututh Nation v. Canada*,[1] after the Court had found that the federal government had not met the duty to consult. The second approval was issued after the federal government had undertaken additional consultation and implemented further measures to address concerns of Indigenous groups, including amending six conditions and putting forward eight accommodation measures focused on addressing marine safety, spill prevention, response capacity, cumulative effects, fish and fish habitat, quieter vessels, and further terrestrial studies.

Several Indigenous groups challenged the second approval, arguing that the Crown had still not fulfilled the duty to consult. In *Coldwater*, the Federal Court of Appeal concluded that the Cabinet decision was reasonable and that the flaws identified with Indigenous consultation in the *Tsleil-Waututh* decision had been addressed through reasonable and meaningful consultation.

[1] 2018 FCA 153 ["*Tsleil-Waututh*"]. For a discussion of this case, see *Mining in the Courts*, Vol. IX.

The *Coldwater* decision provides a helpful summary of key principles relating to the duty to consult. The Federal Court of Appeal re-affirmed that consultation must be meaningful in that the Crown must show that "it has considered and addressed the rights claimed by Indigenous Peoples in a meaningful way" and that it is more than just "a process for exchanging and discussing information."[2] The Court noted that the process of meaningful consultation can result in various forms of accommodation but that "the failure to accommodate in a particular way, including by way of abandoning the Project, does not necessarily mean that there has been no meaningful consultation."[3] The Court noted that although the goal is to reach an overall agreement, that will not always be possible and "reconciliation does not dictate any particular substantive outcome."[4] The Court reiterated that Indigenous groups have reciprocal obligations to not frustrate the Crown's reasonable good faith efforts to engage in consultation, that the duty to consult does not provide a veto over projects, and that Indigenous concerns can be balanced against "competing societal interests"[5] when adequate consultation has taken place.

The Federal Court of Appeal undertook a detailed review of the various alleged deficiencies raised by the Indigenous applicants and determined that they did not render the process unreasonable. The Court underscored that perfection is neither required nor realistic and that imposing too strict a standard could *de facto* create a veto right. In some instances, it found that the Indigenous applicants had hindered Canada's consultation efforts or taken uncompromising positions that had effectively amounted to asserting a veto.

The Supreme Court of Canada subsequently denied leave to appeal this decision.[6]

Similar themes were also seen in *Sagkeeng v. Government of Manitoba et al*, 2020 MBQB 83. This was an application for judicial review by the Sagkeeng Anicinabe (Sagkeeng) of a Ministerial decision to grant Manitoba Hydro a license to construct the Manitoba-Minnesota Transmission Project. Sagkeeng alleged that Manitoba breached its duty to consult in issuing the licence. The Court concluded that Sagkeeng's application was premature (as the band had not pursued an available statutory appeal to Cabinet) and it had failed to establish that the Minister's decision was unreasonable and in breach of the duty to consult.

Sagkeeng argued that the consultation was devoid of any substance or meaning and was "nothing more than a smile." The Court found that the Minister's licensing decision was justified and reasonable and that the consultation was meaningful having regard to the government's consultation efforts and various accommodation measures introduced to address concerns. The Court emphasized that while the consultation and accommodation may have fallen short from Sagkeeng's perspective, reasonableness assessed in context, and not perfection, is the standard.

This decision also highlights the risks of Indigenous groups not fulfilling their reciprocal obligations in consultation. The Court stressed that consultation "is a two-way street" and was influenced by the fact that Sagkeeng was not responsive and timely.

Risks of Unaddressed Cumulative Impacts

Fort McKay First Nation v. Prosper Petroleum Ltd., 2020 ABCA 163 highlights the risks related to unaddressed cumulative impacts on Aboriginal and treaty rights and challenges to projects where there are such concerns, an issue that is increasingly raised in consultation relating to energy and other resource development projects.

In this decision, the Alberta Court of Appeal set aside an approval of the Alberta Energy Regulator (AER) for Prosper Petroleum Ltd.'s (Prosper) proposed Rigel bitumen recovery project (Project). The Project would be within five km of the Fort McKay First Nation's (FMFN) Moose Lake reserves and in an area where FMFN has

[2] *Coldwater* at paras. 40, 41.
[3] *Coldwater* at para. 51.
[4] *Coldwater* at para. 53.
[5] *Coldwater* at para. 57.
[6] *Coldwater First Nation v. Canada (Attorney General)*, [2020] S.C.C.A No. 183.

Treaty 8 harvesting rights. FMFN has been in discussions with Alberta for many years about protecting the Moose Lake area due to significant cumulative impact concerns, and Alberta committed to develop the Moose Lake Access Management Plan (MLAMP) to address those concerns. The MLAMP is not yet finalized as negotiations were delayed while the Lower Athabasca Regional Plan (LARP) was negotiated and implemented, under which the MLAMP will likely be adopted as a sub-plan.

Before the AER, FMFN unsuccessfully argued that approval of the Project should be delayed until the MLAMP is finalized. The AER concluded that the absence of a finalized MLAMP was not a valid reason to deny the approval sought by Prosper. In particular, the AER held that it was precluded from assessing the adequacy of Crown consultation pursuant to s. 21 of *Alberta's Responsible Energy Development Act*, and that it was prohibited under the LARP from deferring the application on the basis that the LARP regional plan is incomplete.

The Alberta Court of Appeal held that while the AER is not permitted by its legislation to consider issues of consultation, it can consider issues of constitutional law as part of its determination of whether an application is in the "public interest," which includes the honour of the Crown. The Court found that the AER took an unreasonably narrow view of what comprises the public interest and ought to have considered whether the honour of the Crown was engaged and required delay of the approval due to the ongoing MLAMP negotiations.

This decision highlights the risks of unaddressed cumulative effects and the honour of the Crown as a separate and distinct basis to challenge projects where there are significant cumulative impacts concerns, particularly with respect to established rights. Notably, the duty to consult in the context of cumulative effects on Aboriginal and treaty rights is not about addressing impacts from other projects or activities (past, present, or future) but mitigating, avoiding, or offsetting any additional incremental impacts.

Denying Approval Based on Indigenous Concerns

In Redmond v. British Columbia (Forests, Lands, Natural Resource Operations and Rural Development), 2020 BCSC 561 the B.C. Supreme Court dismissed an appeal from a decision to deny an application to develop a small, independent run-of-the-river hydroelectric project. The Director of Authorisations for the B.C. Ministry of Forests, Lands, Natural Resource Operations, and Rural Development (Director) had denied the application after concluding the impacts on the Cheam First Nation's (Cheam) asserted Aboriginal right to cultural practices was serious and that the proposed mitigations did not adequately accommodate those impacts (Decision).

The Cheam had informed the proponent and the Director that the proposed location of the project was in an area where significant cultural activities were practiced both historically and currently, including spiritual bathing practices that required unaltered flows of water and absolute privacy. The B.C. Supreme Court held the Decision was reasonable and rejected the proponent's arguments that this constituted an impermissible veto for the Cheam, among other arguments advanced. The Court found that the Director had engaged in a balancing of interests: considering both the impact on asserted rights of many Cheam community members and the benefits of the small hydroelectric project, which would provide limited additional renewable energy to the grid (only enough energy for approximately eight homes) and could be built elsewhere. The Cheam were also generally supportive of run-of-the-river projects and would be prepared to consider other locations within their territory, but the proponent was not willing to pursue alternate locations as he had already invested significant efforts in this one.

The Court noted that apart from the Director's duty to consult, it was also within the scope of the Director's statutory (s. 11 of the *Land Act*) and policy framework to consider the overall impact and the "public's interest" in achieving reconciliation with First Nations, as there is a deep and broad public interest in reconciliation with Indigenous Peoples. In balancing the interests of both parties, the Court noted it was not unreasonable to find that the project should not be allowed in its entirety given its adverse impacts on Aboriginal rights that cannot be adequately accommodated, and that the balance and compromise inherent in the notion of reconciliation will sometimes result in a decision to disallow a project.

Court Rejects Modifying *Haida* Test for Competing Aboriginal and Treaty Rights

In *Gamlaxyeltxw v. British Columbia (Minister of Forests, Lands & Natural Resource Operations)*, 2020 BCCA 215, the B.C. Court of Appeal rejected the lower court's modification of the *Haida* test to address a conflict between asserted and established rights in consultation.

The Gitanyow people (Gitanyow) have an outstanding claim for s. 35 Aboriginal rights in an area that overlaps with the territory subject to the Nisga'a Final Agreement. The Gitanyow challenged two decisions by the Minister under the Nisga'a Treaty to approve the total allowable harvest for moose and the annual management plan for Nisga'a hunters in the non-exclusive Nass Wildlife Area. The Minister consulted with the Gitanyow on the total allowable harvest but did not accept the Gitanyow's position that the moose allocation should be divided between the Nisga'a and the Gitanyow. The Minister took the position that there was no duty to consult with the Gitanyow on the management plan as it would not adversely affect

Gitanyow interests. The B.C. Supreme Court found that consultation was adequate regarding the total allowable harvest and the Minister did not err in concluding that there was no duty to consult regarding the management plan as it did not have any potential to adversely affect the Gitanyow's rights.

While the Court of Appeal largely upheld the B.C. Supreme Court's decision, it rejected the notion that the *Haida* test for the duty to consult needed to be modified in certain situations involving competing asserted and established rights. The B.C. Supreme Court had found that the *Haida* test needed to be modified to preclude a duty to consult an Indigenous group claiming s. 35 rights, where the recognition of such a duty would be inconsistent with the Crown's duties to another Indigenous group with whom it has a treaty. In this case, the Gitanyow before the Minister and the B.C. Supreme Court sought a form of accommodation that would have required the Minister to contravene the Nisga'a Treaty. The Gitanyow modified its position on appeal and took issue with the B.C. Supreme Court's modification of the *Haida* test, which precluded consultation altogether.

The Court of Appeal stated that "the existence of treaty rights may limit any accommodation rights a claimant may seek, as the Crown cannot be required to breach a treaty in order to preserve a right whose scope has not yet been determined,"[7] but that it is unnecessary to modify the *Haida* test as it is sufficiently flexible to resolve conflicts between asserted and established rights. In other words, any conflict can be dealt with at the accommodation stage and such a conflict does not negate the existence of a duty to consult Indigenous groups with asserted claims that may be adversely impacted by the decision.

The Scope of Consultation for Asserted Aboriginal Title Claims

In *Ross River Dena Council v. Yukon*, 2020 YKCA 10, the Yukon Court of Appeal clarified the scope of consultation obligations in the context of Aboriginal title assertions. This was an appeal of the decision in *Ross River Dena Council v. Yukon*, 2019 YKSC 26, which was discussed in *Mining in the Courts*, Vol. X. In that decision, the declaratory relief sought by the Ross River Dena Council (RRDC) in respect of hunting licenses and seals issued by Yukon and its consultation obligations was denied on the basis RRDC had an asserted claim as opposed to an established one, and the consultation framework for unestablished claims had been met.

[7] *Gamlaxyeltxw* at para. 13.

On appeal, the RRDC argued that the issuance of hunting licences and seals interfered with its claimed right to exclusive use and occupation of the land and that the presence of hunters on the land would be a violation of the incidents of the RRDC's asserted title claim.

The appeal was dismissed for two reasons. First, the licences at issue did not themselves give the licence holders the right to enter land that they could not otherwise enter. Second, the RRDC did not have proven title and as such did not have a right to control the use and occupation of the land at present or a veto over government action. The Court of Appeal also noted that the RRDC had not identified any potential adverse impact to its asserted claim, which could affect the ability to fully realize the benefits of Aboriginal title, if and when it is finally established. The Court noted that the RRDC's objection to non-RRDC hunters entering the area was not evidence of an adverse impact on its title claim.

This decision is consistent with prior Court decisions that have held that consultation is intended to prevent irreversible damage to Indigenous interests pending proof or settlement of claims and is not intended to provide Indigenous groups with what they would be entitled to if they prove or settle their claims.[8]

[8] See, for example, *Ka'a'Gee Tu First Nation v. Canada (Attorney General),* [2012] F.C.J. No. 237 at para. 123; *Adams Lake Indian Band v. British Columbia*, [2013] B.C.J. No. 1026 at paras. 95-99.

Article

Federal and B.C. Governments Forge Ahead on Challenging Path to Implement UNDRIP: An Update on UNDRIP Implementation Efforts

Bryn Gray and Selina Lee-Andersen

In December 2020, the federal government introduced legislation that will likely result in it becoming the second jurisdiction in Canada (after B.C.) to pass framework legislation for the implementation of the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration or UNDRIP). UNDRIP was adopted by the United Nations General Assembly in September 2007 and is the most comprehensive international declaration or agreement on the rights of Indigenous Peoples. Its stated purpose is to establish a universal framework of minimum standards for the survival, dignity and well-being of Indigenous Peoples around the world. It seeks to build on existing human rights standards and fundamental freedoms as they apply to a range of issues affecting Indigenous Peoples, from culture and language to education and land rights.

UNDRIP also includes more contentious provisions that stipulate that governments should consult and co-operate in good faith in order to obtain the free, prior, and informed consent (FPIC) of Indigenous groups in a number of situations, including "prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."[9]

Canada initially opposed the Declaration in 2007 due largely to concerns that the FPIC provisions could be interpreted as a veto over resource development and administrative and legislative decision-making. The interpretation of the FPIC provisions as a veto is not consistent with s. 35 of the *Constitution Act, 1982*[10] and the jurisprudence on the duty to consult. Crown decisions that have the potential to adversely impact asserted or established Aboriginal rights trigger the duty to consult and potentially a requirement to accommodate, but the Supreme Court of Canada has repeatedly stated that it does not provide a veto and that consent is only required in very limited situations — impacts to established Aboriginal title (subject to the justification test) and unjustifiable infringements of established Aboriginal rights.

Canada's position on UNDRIP has evolved over time. In 2010, the federal government issued a statement of qualified support for UNDRIP but noted that the Declaration was aspirational and non-legally binding and expressed continued reservations about the FPIC provisions. In 2016, the then newly elected Trudeau government issued a statement of "unqualified" support.

This article provides an update on recent efforts to implement the Declaration in Canada, including the introduction of Bill C-15 by the federal government and how the concept of free, prior and informed consent is being interpreted by both the federal and B.C. governments.

Federal Efforts to Implement UNDRIP

Overview of Bill C-15

On December 3, 2020, the federal government introduced Bill C-15 (*United Nations Declaration on the Rights of Indigenous Peoples Act*), which is designed to guide the implementation of the Declaration at the federal level. The purpose of Bill C-15 is to affirm the Declaration as a universal international human rights instrument with application in Canadian law and to provide a framework for the federal government's implementation of the Declaration.

The proposed legislation is based largely on Bill C-262, a private member's bill that was introduced in 2016 by NDP MP Romeo Saganash, but died on the order paper before the 2019 federal election. It is also similar to B.C.'s *Declaration on the Rights of Indigenous Peoples Act* (DRIPA).[11] Bill C-15 requires the federal government to work in

[9] UNDRIP, article 32(2).

[10] *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[11] S.B.C. 2019, c. 44.

consultation and co-operation with Indigenous Peoples to:

- take all measures necessary to ensure the laws of Canada are consistent with the Declaration;
- prepare and implement an action plan to achieve the Declaration's objectives; and
- for a period of 20 years following the coming into force of the Act, table an annual report on progress to align the laws of Canada and on the action plan.

The legislation differs from Bill C-262 and DRIPA in a few respects, including:

- more prescriptive requirements for the action plan, including that it must contain provisions relating to monitoring, oversight, recourse or remedy with respect to the implementation of UNDRIP;
- the omission of provisions allowing Canada to enter into agreements with Indigenous groups for the joint exercise of a statutory power of decision or for the consent of the Indigenous groups prior to the exercise of a statutory power of decision (unlike DRIPA); and
- a more detailed preamble.

Implications of Bill C-15

While there will likely be litigation about this issue, the wording of the legislation and statements by the federal government indicate that the legislation, if passed, will not actually give force and effect to UNDRIP in federal law. It is instead intended to provide a framework for the federal government to implement UNDRIP over time. Notably, the backgrounder that the federal government issued when it introduced the legislation indicates that Bill C-15 does not create new obligations or regulatory requirements for industry and would not impact Canada's existing duty to consult or other consultation or participation requirements set out in other legislation, such as the new *Impact Assessment Act*.[12] These statements are consistent with the legislation being framework legislation — where the actual changes will come about at a later date through the implementation of the action plan.

However, it is notable that these statements by the federal government were limited to the legislation itself. This leaves open the possibility that the federal government will introduce changes in the future as part of its implementation efforts that could impose new obligations or regulatory requirements for industry.

The federal government has not been clear about what those changes may be. The legislation is silent on free, prior, and informed consent. The federal government did address this issue in its backgrounder stating that:

> "Free, prior and informed consent is about working together in partnership and respect. In many ways, it reflects the ideals behind the relationship with Indigenous Peoples, by striving to achieve consensus as parties work together in good faith on decisions that impact Indigenous rights and interests. Despite what some have suggested, it is not about having a veto over government decision making."[13]

This language and prior government statements and actions suggest that the federal government is continuing to interpret Indigenous consent as an objective and not an absolute requirement in the context of resource development projects. However, it is unclear whether there will be changes in the future that further enhance consultation requirements and scrutiny of efforts to achieve consent as part of the action plan. The federal government previously stated that its *Impact Assessment Act* (discussed further below) is aligned with UNDRIP but left open the possibility that there could be changes or it could impact the implementation of the *Impact Assessment Act* and other federal legal duties. Notably, after indicating that Bill C-15 would not change the duty to consult and other existing consultation requirements, the federal government stated in the Bill C-15 backgrounder that it may "inform how the Government approaches the implementation of its legal duties going forward,"[14] without explaining how. The federal government also notes in the backgrounder that FPIC may require "different processes or new creative ways of working together to ensure meaningful and effective participation in decision-making"[15] but does not explain what those processes might be and how they could impact project decision-making.

These difficult questions have been deferred to another day, leaving considerable uncertainty about potential future changes to the rules of Indigenous engagement for projects and the timing of any such changes. The challenge for the federal government will be to advance its commitments

[12] S.C. 2019, c. 28, s. 1.
[13] https://www.justice.gc.ca/eng/declaration/about-apropos.html
[14] https://www.justice.gc.ca/eng/declaration/about-apropos.html
[15] https://www.justice.gc.ca/eng/declaration/about-apropos.html

through the development of an action plan and priorities in a way that does not stifle investment or create additional uncertainty. To do so, it must manage the expectations that it has created while striking a balance between competing interests.

At a minimum, it is likely that any implementation of UNDRIP at the federal level will lead the federal government to enhance its scrutiny of consultation, accommodation, and efforts to achieve consent. However, we anticipate the federal government will continue to approve certain projects where consent has not been achieved, particularly in instances where there are both groups supporting and opposing the project.

It is important to note that this legislation, if passed, will only impact federal decision-making. It does not apply to provincial or territorial decision-making unless and until each government takes steps to implement UNDRIP. Many other provinces are either opposed to implementing UNDRIP or are currently taking no steps to implement the Declaration, largely due to concerns relating to the FPIC provisions. To our knowledge, the only other jurisdiction in Canada that is currently taking active steps to implement UNDRIP (aside from B.C.) is the Northwest Territories.

B.C. Efforts to Implement UNDRIP

Overview of B.C.'s *Declaration on the Rights of Indigenous Peoples Act*

In November 2019, British Columbia (B.C.) became the first jurisdiction in Canada to adopt the Declaration when it passed the *Declaration on the Rights of Indigenous Peoples Act* (DRIPA). DRIPA is intended to form the foundation for B.C.'s work on reconciliation. DRIPA's three stated purposes are to: (i) affirm the application of the Declaration to the laws of B.C.; (ii) contribute to the implementation of the Declaration; and (iii) support the affirmation of, and develop relationships with, Indigenous governing bodies. As a framework piece of legislation, DRIPA requires the province to:

- in consultation and co-operation with Indigenous Peoples, take all measures necessary to ensure the laws of B.C. are consistent with the Declaration;
- prepare and implement an action plan to achieve the objectives of the Declaration and prepare an annual report outlining its progress in implementing the action plan; and
- possibly, for the purposes of reconciliation, enter into agreements with Indigenous governing bodies in relation to the exercise of a statutory power of decision.

The B.C. government has stated that DRIPA is not intended to immediately affect or change any existing laws; rather, it is intended to be forward looking, with a gradual and incremental implementation process as laws are introduced or amended in consultation with Indigenous Peoples and stakeholders including business, industry and local government. Accordingly, DRIPA is also not expected to result in any immediate changes to the common law duty to consult framework or to existing regulatory frameworks.

Similar to Bill C-15, DRIPA's text and the implementation of the Declaration into provincial laws has raised questions about how FPIC will be interpreted and applied. The B.C. government's position is that it does not view FPIC as an unqualified veto right. However, it appears that consent could notionally become the standard in certain circumstances, whether through the use of the agreement mechanism under DRIPA (which includes express contemplation of a negotiated consent requirement prior to a government decision on matters affecting an Indigenous group), through legislative amendments, or as a condition to granting a project approval. That said, the provincial government retains discretion over both the DRIPA agreement mechanism and regulatory decision-making processes such as B.C.'s updated environmental assessment (EA) process (discussed in further detail below). The manner and extent to which FPIC is applied will largely depend on the context. Notably, the legal context in B.C., particularly the significant number of Aboriginal title claims and the absence of treaties in large portions of the province, is quite different from other areas of the country.

UNDRIP Implementation in Action

The B.C. government sees the new provincial environmental assessment (EA) process as a potential model for applying FPIC in a regulatory context. B.C.'s EA process was updated with the passage of the *Environmental Assessment Act* (EAA)[16] in November 2018. The new EAA introduced significant changes to the provincial EA process, including an early engagement process, increased opportunities for public participation, and prescriptive measures to meet the provincial government's commitment to implement the Declaration. The new EAA and the majority of its regulations came into force on December 1, 2019 (regulations still under development include the *Dispute Resolution Regulation* and *Indigenous Capacity Funding Regulation*).

B.C.'s updated EA process is designed to advance reconciliation with Indigenous Peoples by implementing the Declaration, the Truth and Reconciliation Commission Calls to Action, and the Supreme Court of Canada's 2014 decision in *Tsilhqot'in Nation v. British Columbia*[17] within the context of the EA. Under the EA process, the concept of FPIC is framed as a consensus-building process, which is undertaken through co-operation between the Environmental Assessment Office (EAO) and participating Indigenous nations in order to achieve consensus on process decisions or recommendations. According to the EAO User Guide, consensus is defined as "an outcome or approach that is actively supported by all participating Indigenous nations and the EAO or is not objected to by a participating Indigenous nation, while reserving their right to ultimately indicate their consent or lack of consent for a project after an assessment based upon full consideration of the project."

Under the new EA process, there are two stages at which Indigenous nations can express their consent or lack of consent — at the Readiness Decision stage (where a decision is made on whether a project should proceed to an EA review) or as a component of the recommendations to the Ministers regarding whether to issue an EA certificate. In addition, Ministers are legally required to consider the consent or lack of consent of participating Indigenous nations, and the Ministers must provide reasons for their decision in light of the decision of Indigenous nations.

The federal government has also enhanced the role of Indigenous groups in environmental assessments through its *Impact Assessment Act* (IAA).[18] Indigenous groups are engaged at all stages of the impact assessment (IA) process and there are increased opportunities for Indigenous participation in decision-making. In particular, impacts on Indigenous Peoples and rights must be explicitly addressed at key decision points in the IA process, including the decision on whether to require an impact assessment, and the final public interest determination. Tools to facilitate Indigenous engagement under the IAA include Indigenous Engagement and Partnership Plans, consultation protocols and frameworks for collaboration, funding programs, and co-operation agreements. Within the IA process, the level of Indigenous participation will reflect the context of a given project and the degree of potential impacts on Indigenous communities. The federal government's approach aims to strike a balance between competing interests, including where certain affected Indigenous groups support a project and others oppose it. It does not go as far as the B.C. legislation in including specific requirements about considering the presence or absence of consent. That said, there continues to be heightened expectations of consent and confusion in this area. This is due in part to earlier statements by the federal government about its "unqualified support" for the Declaration, which it has in fact qualified through further statements and actions.

Both the B.C. and federal governments have developed a series of guidance documents for each of the EA and IA processes, including the B.C. government's Guide to Consensus-Seeking under Environmental Assessment Act, 2018 and the federal guidance on the *Assessment of Potential Impacts on the Rights of Indigenous Peoples*. In addition to producing a series of guidance documents for each phase of the EA process, the B.C. government has set up an Indigenous Nation Web Portal, which is a collection of resources specifically tailored to assist Indigenous nations' participation in the EA process. Additional federal guidance documents are available on the Impact Assessment Agency's Policy and Guidance website.

As the B.C. and federal impact assessment processes are new, it remains to be seen when the lack of consent will stop projects from proceeding. However, both statutes and the UNDRIP implementation efforts of the B.C. and federal

[16] S.B.C. 2018, c. 51.
[17] 2014 SCC 44.
[18] S.C. 2019, c. 28, s. 1.

governments generally highlight the importance of early and robust consultation with Indigenous groups on projects and the increased risks of not obtaining consent of at least some of the potentially affected Indigenous groups.

Both the B.C. and federal governments have difficult tasks ahead in striking a fair balance with competing interests particularly in the context of project development and other decisions affecting third parties. As former Chief Justice McLachlin noted in *Haida Nation v. British Columbia (Minister of Forests),* "balance and compromise are inherent in the notion of reconciliation."[19] Balance and compromise have been core principles of the reconciliation framework that the courts have developed through their interpretation of s. 35 of the *Constitution Act, 1982*. This includes taking into account the degree of impacts and the nature of the Aboriginal interests at issue when making a decision and in assessing the level of consultation and accommodation required, as not all impacts are the same and the nature of rights can vary considerably — from established rights and strong rights and title claims to more tenuous rights assertions. There can also be conflicting positions between affected Indigenous groups on a particular project and significant benefits that projects can provide to the Indigenous groups supporting the projects — benefits that can help to advance the critical objective of economic reconciliation.

It is not an easy road ahead, and it will be important that any enhancements to Canada's reconciliation framework maintain the principles of balance and compromise and enhance transparency to all potentially affected parties.

[19] 2004 SCC 73 at para. 50.

Case Law Summaries

Administrative Law

Lindsay Burgess and Kathryn Gullason

David Suzuki Foundation v. Canada-Newfoundland and Labrador Offshore Petroleum Board, 2020 NLSC 94

In this decision, the Newfoundland and Labrador Supreme Court quashed a decision of the Canada-Newfoundland and Labrador Offshore Petroleum Board (Board), which effectively granted an extension of an exploration license beyond the nine-year statutory limit after the licensee was prevented from commencing drilling due in part to regulatory hurdles and delays.

The applicants, who were various foundations including the David Suzuki Foundation, sought judicial review of a decision of the Board that authorized the surrender and re-issuance of an exploration license to Corridor Resources Inc. (Corridor) over the same offshore area shortly before the original license was set to expire. Under the Board's governing legislation, the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act* and the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act*, (Accord Acts), an exploration license cannot be renewed beyond a nine-year maximum term. The Accord Acts permit the Board to directly issue an exploration license without making a call for bids where the Board issues the license to an interest owner in exchange for the surrender by the interest owner of any other interest.

The original licence was issued to Corridor in 2008, and required Corridor to begin drilling an exploration well within five years; however, this deadline was extended until 2017, the nine-year statutory deadline. When it became clear that Corridor would not begin drilling by that date, Corridor and the Board agreed to exchange the original license for a new license in respect of the same offshore area, effectively starting the statutory clock again.

The applicants argued that the Board's decision contravened and undermined the Accord Acts in three ways. First, exchanging an old license for a new license over an area identical to that surrendered was not permitted on any reasonable reading of the Accord Acts. Second, the Board had contravened the Accord Acts by indirectly extending the exploration license beyond the statutory maximum of nine years when it was expressly prohibited from doing so directly. Finally, the Board's decision attempted to circumvent the Accord Acts to remedy the Board's own failures and regulatory delays.

The Court found that the Board's decision to exchange the license was unreasonable, and quashed it. The Board did not have unfettered discretion to do what it perceived to be in the best interests of the industry, and it did not have the discretion to make an exception to a mandatory provision of its enabling legislation that was intended to limit its authority. The Board's decision was contrary to the legislative history (wherein the discretion to grant renewals had been expressly removed), as well as the purpose and scheme of the Accord Acts, and the principle of internal coherence. The Court accepted that the Board was motivated by valid objectives, such as ensuring a stable and fair offshore-management regime; however, it was not entitled to conduct a discretionary balancing or to rely on general policy objectives where doing so overrode clear statutory language that limited its authority.

Treelawn Capital Corp. v. IAMGOLD Corporation, 2019 ONCA 1022

In this decision, the Ontario Court of Appeal confirmed that the Ontario Mining and Lands Tribunal has jurisdiction to adjudicate all issues involving the exercise of a statutory right under its home statute, even though the Ontario Superior Court of Justice has concurrent jurisdiction.

IAMGOLD Corporation commenced an action against Treelawn Capital Corp. (Treelawn) in the Mining and Lands Tribunal seeking an order requiring Treelawn to pay a portion of expenditures related to the development of land and mining claims that the parties co-own. Treelawn applied to have the proceeding transferred to the Ontario Superior Court of Justice pursuant to s. 107 of the *Mining Act*, R.S.O. 1990, c. M.14, arguing that an oral agreement between the parties released them of any requirement to contribute to the expenses of the claims, and concurrently filed a statement of claim with the Ontario Superior Court of Justice. The application judge refused to transfer the proceedings, finding that the issue was within the Tribunal's expertise and that the *Mining Act* provided a sufficient procedure to resolve the dispute.

The Court of Appeal held that the application judge was entitled to find that: (i) the matters in question fell within the tribunal's expertise; (ii) s. 181(2) of the *Mining Act* provides that co-owners of land should apply to the Tribunal to address rent and expenditures; (iii) s. 181(4) of the *Mining Act* provides the parties with an opportunity to raise the issue of the oral argument before the Tribunal; and (iv) the Tribunal is within its jurisdiction to address any other issues that arise, including jurisdictional Issues, based on its expertise in interpreting the *Mining Act*. The Court of Appeal also rejected Treelawn's argument that because the oral agreement involved a matter of property and civil rights instead of simply involving rights under the *Mining Act*, the matter should be transferred to the Ontario Superior Court of Justice. The Court reaffirmed that the Tribunal has jurisdiction to adjudicate all issues within its specialized expertise, even where the Ontario Superior Court of Justice has concurrent jurisdiction.

Case Law Summaries

Bankruptcy and Insolvency

Kathryn Gullason

British Columbia (Attorney General) v. Quinsam Coal Corporation, 2020 BCSC 640

In this decision, the British Columbia Supreme Court rejected an argument that the Supreme Court of Canada's decision in *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5 (*Redwater*) requires regulatory obligations to always take priority over secured interests in a bankrupt's property.[20] The Court held that, at most, *Redwater* stands for the proposition that a trustee in bankruptcy should only use the assets of the estate to fulfill regulatory obligations.

Quinsam Coal Corporation (Quinsam) was the owner and operator of the Quinsam Coal Mine (Mine) on Vancouver Island. Quinsam executed a promissory note in favour of ENCECo, Inc. (ENCECo), granting ENCECo a security interest in its coal inventories and the proceeds of their sale. ENCECo subsequently informed Quinsam that it was in default of the promissory note and demanded payment. Shortly after, the Mine ceased operations and the coal inventories were sold. No payment was made to ENCECo.

Quinsam then made an assignment into bankruptcy under the *Bankruptcy and Insolvency Act* (BIA). Quinsam's trustee in bankruptcy abandoned the Mine without fulfilling the Mine's closure, reclamation, and remediation obligations under the B.C. *Mines Act*. The British Columbia government stepped in to protect the site and mitigate the damage. At the time of the hearing, B.C. held over C$7 million in security from Quinsam for reclamation activities, but the expected cost of reclaiming the Mine was several millions of dollars more than that.

B.C. brought an application seeking that the proceeds of the sale of the coal inventories be used to satisfy Quinsam's regulatory obligations. ENCECo, the respondent, argued that it was entitled to the proceeds as Quinsam's secured creditor. The Court agreed with ENCECo.

B.C. relied on the Supreme Court of Canada's decision in *Redwater* to support its argument that Quinsam's resources should fulfill the company's regulatory obligations before any payment was made to secured creditors. B.C. argued that this would fulfill the "polluter pays" principle and reduce the burden on B.C. taxpayers. ENCECo, on the other hand, argued that *Redwater* was distinguishable because the *Mines Act* does not prioritize

[20] The Supreme Court of Canada's decision in *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, was discussed in *Mining in the Courts*, Vol. IX.

reclamation and abandonment costs to the same extent as the Alberta regulatory scheme at issue in *Redwater*.

The Court agreed that Alberta's regulatory regime differs from the B.C. *Mines Act*, as it expressly renders a trustee responsible for regulatory obligations by including "trustee" within the definition of "operator," while the B.C. Act does not. Further, the Alberta regime renders the estate liable for end-of-life obligations, which the B.C. *Mines Act* does not do. The Court held that the proceeds from the sale of the coal inventories were not assets of the estate and, therefore, could not be used to meet Quinsam's regulatory obligations to reclaim or remediate the Mine.

Dominion Diamond Mines ULC v. Diavik Diamond Mines (2012) Inc., 2020 BCSC 1509

In this decision, the British Columbia Supreme Court adjourned an application for security for costs and stayed a proceeding pending the outcome of a sale process under the *Companies' Creditors Arrangement Act* (CCAA).

Dominion Diamond Mines ULC (Dominion) sought and obtained an initial order under the CCAA from the Alberta Court of Queen's Bench, citing the global COVID-19 pandemic and resulting difficulties in getting diamonds to market as the catalyst for seeking CCAA protection. Dominion then filed a claim against Diavik Diamond Mines (2012) Inc. (Diavik) alleging that Diavik breached the terms of a joint venture agreement regarding the development of mineral resources at the Diavik Diamond Mine (Mine) in the Northwest Territories. Dominion also alleged that Diavik breached its fiduciary obligations as manager of the Mine.

Diavik denied Dominion's allegations, and brought an application seeking security for costs. In support of its application, Diavik argued that there was a strong *prima facie* case that Dominion would not be able to pay a potential costs award against it because Dominion was insolvent and had no assets in British Columbia.

The Court adjourned Diavik's application for security for costs, and granted Diavik liberty to reset the application at a later date. The Court also held that the action would be stayed in the interim, with the exception that Diavik could set a trial date, and the Court ordered that the stay could be lifted by the mutual consent of the parties or further order of the Court.

The Court based its decision to adjourn the application on three factors. First, Dominion's financial position could change as a result of the CCAA sale process, and it was preferable to hear the security for costs application with a complete understanding of Dominion's financial position. Second, Diavik would not be prejudiced as a result of the adjournment because of the early stage of the litigation and the fact that the action would be stayed in the interim. Third, the Court stated it would have adjourned the application in any event in order for Diavik to seek leave from the Alberta Court of Queen's Bench to pursue the security for costs application. The CCAA Order imposes a "stay period," which precludes the exercise of rights and remedies against Dominion except with leave of the court. The Court determined that any uncertainty regarding the scope of the CCAA stay period should be resolved by the Alberta Court in the context of the CCAA proceedings.

Lydian International Limited (Re), 2020 ONSC 4006

In this decision, the owners of a development-stage gold mine in Armenia sought approval of a plan of arrangement (Plan) under the *Companies' Creditors Arrangement Act* (CCAA) after being unable to access the mine for two years due to blockades.

The motion for an order approving the Plan was brought by three controlling entities of the Lydian Group (Lydian), which owns the Amulsar Mine (Mine) in south-central Armenia. Since June 2018, there have been blockades at the Mine by environmental activists. Lydian engaged in negotiations with the Armenian government and commenced legal proceedings in Armenia to enforce its rights, but its efforts were unsuccessful. As a result of the blockades, Lydian was unable to complete construction of the Mine, and begin generating revenue from it. Lydian cited the effects of the blockade, among other factors, as the reason it had to seek CCAA protection.

In considering whether to approve the Plan, the Court considered compliance with all the statutory requirements to reorganize including: (i) whether Lydian met the definition of a "debtor company" under the CCAA; (ii) whether the claims against Lydian exceeded C$5 million; and (iii) whether the creditors' meeting approving the Plan was properly carried out. The Court also considered if the Plan was fair and reasonable. The Court granted the motion, and approved and sanctioned the Plan.

Yukon (Government of) v. Yukon Zinc Corporation, 2020 YKSC 15

In this decision, the Yukon Supreme Court found that the Yukon government (Yukon) had a provable claim in bankruptcy for the costs of environmental remediation of a mine.

Yukon Zinc Corporation (YZC) owned and operated the Wolverine Mine (Mine) in the Yukon Territory. The Mine was a zinc-silver-lead mine with copper and gold byproducts. The Mine entered production in March 2012 and operated for approximately three years before being put into care and maintenance. In March 2015, YZC restructured its debt under the *Companies' Creditors Arrangement Act* (CCAA) and emerged from CCAA protection in October 2015. However, the Mine never re-entered production, and the condition of the Mine deteriorated. As a result, Yukon took on an increasing role in the Mine, including monitoring its condition and taking measures to prevent and mitigate adverse effects on the environment. In July 2019, Yukon commenced proceedings under s. 243 of the *Bankruptcy and Insolvency Act* (BIA), and when YZC failed to file a proposal to its creditors by the deadline, YZC was deemed to have made an assignment into bankruptcy.

Yukon paid for the environmental monitoring and remediation of the Mine using security posted by YZC pursuant to s. 139(1) of the Yukon *Quartz Mine Act* (QMA), which requires a licensee to post security where there is a risk of adverse environmental effects due to the activities of the licensee. However, the security posted by YZC was insufficient to cover the anticipated total remediation costs.

Yukon brought an application before the Yukon Supreme Court seeking a declaration that, among other things, it has a provable claim for the additional costs of the environmental remediation that Yukon would have to pay out of pocket.

The application was granted. The Court held that Yukon has a provable claim in bankruptcy on costs actually incurred (or sufficiently certain to be incurred) to remediate the Mine over and above the security currently held by Yukon. The Court further found that Yukon's claim was secured on the real property of YZC affected by the damage, and was enforceable in the same way as any security on real property. Finally, Yukon's claim would have first priority on the affected property, pursuant to s. 14.06(7) of the BIA.

The Court confirmed that in order to be provable, a contingent claim must not be too remote or speculative. Thus, only once Yukon incurred costs for care and maintenance and environmental remediation at the Mine, or it was sufficiently certain that those costs would be incurred, could Yukon exercise its super-priority charge against the property.

Article

Preserving Permits, Licenses and Tax Attributes in Distressed M&A Transactions by Reverse Vesting Orders

Gabriel Faure, Francois Alexandre Toupin, and Gabrielle G. Maurer

In *Nemaska Lithium inc, Re, (Nemaska Lithium)*,[21] the Superior Court of Québec issued a reverse vesting order (RVO) to effect the purchase of the debtors, *Nemaska Lithium*, by a consortium, despite opposition from a royalty holder. In doing so, the Court confirmed its authority to approve a novel type of transaction by which the purchaser acquires all of the shares of an insolvent business, while the latter's unwanted assets and liabilities are transferred to a newly incorporated corporation.

Introduction

In January 2020, the Supreme Court of Canada reiterated in *9354-9186 Québec inc. v. Callidus Capital Corp (Bluberi)*,[22] that judges supervising insolvency proceedings under the *Companies' Creditors Arrangement Act* (CCAA)[23] have a broad discretion to make any order that they consider appropriate in the circumstances. Echoing its prior ruling in *Century Services Inc. v. Canada (AG)*,[24] the Court held that the CCAA is a flexible statute that allows insolvency professionals to put forth innovative and creative solutions to meet the ever growing challenges of reorganizing debtors in a complex world which requires creative and effective decisions.

In *Bluberi*, the Court acknowledged that, unless the order sought is prohibited by the CCAA, a CCAA Court can make any order it considers appropriate in the circumstances in furtherance of the CCAA's overarching remedial objectives. These include avoidance of the potentially catastrophic impacts of insolvency on the stakeholders of insolvent debtors, including the social and economic losses resulting from liquidation. In pursuit of these objectives, CCAA proceedings have evolved to permit outcomes that do not result in the emergence of the debtor in a restructured state by the approval and implementation of a plan of compromise or an arrangement, such as "Liquidating CCAAs" or, for instance, RVOs.

Prior to the judgment in *Nemaska Lithium*, six RVOs had been rendered without opposition and reasons in several Canadian restructurings, leaving doubts as to their legality. On October 15, 2020, the Honourable Louis J. Gouin of the Superior Court of Québec rendered Canada's first contested RVO in the CCAA proceedings of *Nemaska Lithium*, relying on his discretion as supervising judge and the criteria set forth in s. 36 of the CCAA to approve the creative solution required to restructure Nemaska Lithium and avoid the consequence of the alternative: a liquidation through bankruptcy proceedings.

On November 11, 2020, the Court of Appeal dismissed two applications for leave to appeal the RVO, further strengthening the status of the RVO as an additional restructuring tool.

Context

Prior to initiating CCAA proceedings in December 2019, Nemaska Lithium was developing a significant spodumene lithium hard rock deposit, known as the Whabouchi mine located in the James Bay Region of the Province of Québec, as well as a commercial electrochemical plant, where the spodumene concentrate would be transformed into high purity lithium hydroxide using the proprietary methods developed by Nemaska Lithium.

At the time of the judgment, Nemaska Lithium had been undertaking, for more than 18 months, significant efforts to find investors, buyers or strategic partners for its business and assets in order to complete the construction and commissioning of the Whabouchi mine and the electrochemical plant. These efforts translated into two thorough sale or investor solicitation processes (SISP) conducted with the assistance of Nemaska Lithium's financial advisors. The first SISP was conducted prior to the CCAA proceedings (from February to December 2019), and the second SISP was approved by the Court and conducted in the context of the CCAA proceedings under the supervision of the CCAA judge and the monitor (from April to August 2020). Despite having canvassed the whole spectrum of potentially interested parties, the second SISP's outcome yielded a single serious offer, from a consortium comprised of Orion Mine Finance, Investissement Québec and The Pallinghurst Group (the Consortium), which was accepted by Nemaska Lithium and presented to the Court for approval (the Offer).

[21] 2020 QCCS 3218, leave to appeal to CA denied 2020 QCCA 1488, leave to appeal to SCC requested. McCarthy Tétrault LLP acted as counsel for the debtors, Nemaska Lithium inc., Nemaska Lithium Shawnigan Transformation inc., Nemaska Lithium P1P inc., Nemaska Lithium Whabouchi Mine inc., and Nemaska Lithium Innovation inc. (collectively, Nemaska Lithium).

[22] 2020 SCC 10.

[23] R.S.C. 1985, c. C-36.

[24] 2010 SCC 60.

Essentially, the Offer and the transactions contemplated therein provided for the acquisition by the Consortium of all shares of a corporation resulting from the amalgamation of Nemaska Lithium and its four subsidiaries, and the transfer of certain excluded assets and liabilities to two newly incorporated corporations by way of an RVO. One of the innovative features of the Offer was the forced exchange of shares of Nemaska Lithium for shares of a new parent corporation (New Parent). In order to enable the acquisition by the Consortium of the shares of Nemaska Lithium, New Parent was incorporated as a parent entity to Nemaska Lithium. All of the issued shares of Nemaska Lithium were subsequently exchanged for shares of New Parent, resulting in New Parent holding all of the issued and outstanding shares in the capital of Nemaska Lithium. Ultimately, the Consortium acquired from New Parent the shares of Nemaska Lithium. The foregoing steps had not been included in previous RVOs, but were essential to the success of the transaction given Nemaska Lithium's status as a public issuer.

How do RVOs Provide for Greater Restructuring Flexibility?

A traditional vesting order transfers the assets of the debtor to a purchaser free and clear of any liability or encumbrance, in exchange for the payment of a purchase price to the debtor. The RVO does the opposite: it transfers – "vests out" – unwanted assets and liabilities of the debtor to a newly incorporated or existing corporation (Residual Corporation) and approves the issuance of shares in the debtor to the purchaser, in exchange for the consideration contemplated by the purchase agreement. This can include a payment by the purchaser to the Residual Corporation, which becomes a debtor in the insolvency proceedings. This is done on an expedited timeline when compared to a plan of compromise or arrangement, and is beneficial to all stakeholders given that most CCAA debtors are cash flow negative.

Among other benefits, RVOs make it possible to maximize the value of a debtors' assets by maintaining in force existing permits, licenses, authorizations and essential contracts, and by maximizing the use of the various tax attributes available. Traditional vesting orders do not allow for these same benefits.

In the case of a debtor doing business in a highly regulated sector such as the mining industry, this means that the purchaser would not have to undertake the lengthy processes required to obtain the necessary permits, licenses and authorizations for the mine, which would involve additional delays to the resumption of operations, the closing of the transaction, or both, not to mention additional costs.

These benefits are particularly relevant where the purchase of a debtor's business is conditional on the maintenance of certain essential contracts, which would otherwise need to be renegotiated with, or assigned to, the purchaser. In the case of Nemaska Lithium, agreements with certain First Nations communities in the area of Nemaska Lithium's operations were therefore kept in place as a result of the RVO.

The Court has the Authority to Render the RVO

The main issue in *Nemaska Lithium* hinged on whether the Court had jurisdiction under the CCAA to render the RVO sought by Nemaska Lithium. While Nemaska Lithium contended that the Court had jurisdiction to issue an RVO on the basis of its broad discretion, a royalty holder argued, based on a plethora of legal grounds, that the RVO sought was illegal.

The Court recognized that the requested RVO proposed a complex, innovative and creative reorganization. However, it cautioned against the temptation of dissecting and analyzing each and every step and component of a transaction with a reverse vesting structure. According to the Court, to proceed this way would seriously and detrimentally restrict the range of innovative solutions available to address commercial and social contemporary issues in the context of CCAA restructurings, which are becoming increasingly complex. With reference to *Bluberi*, the Court rather suggested that it is necessary to take a step back and consider the transaction as a whole (the global picture).[25]

In light of the foregoing, the Court concluded that it had the discretionary authority, as granted by s. 11 of the CCAA and reaffirmed by the Supreme Court of Canada

[25] *Nemaska Lithium* at paras 80-83.

in *Bluberi*, and pursuant to s. 36 of the CCAA, to approve the transaction and consequently rendered the RVO.

In confirming its authority to grant the RVO, the Court considered the following non-exhaustive factors found in s. 36(3) of the CCAA:

- Whether sufficient efforts to get the best price have been made and whether the parties acted providently;
- The efficacy and integrity of the process followed;
- The interests of the parties; and
- Whether any unfairness resulted from the process.

The Court had no doubt that Nemaska Lithium had conducted a thorough SISP, both prior to and in the context of the CCAA proceedings. As underscored by the Court, the Offer was not only the sole offer resulting from the SISP, but also the best and only viable alternative in the circumstances to avoid liquidation through bankruptcy proceedings, which would be catastrophic for Nemaska Lithium's stakeholders.

The Court was of the view that Nemaska Lithium's creditors do not have the right to vote on an application under s. 36 of the CCAA, which only requires the approval of the Court subject to the consideration of the non-exhaustive factors listed in s. 36(3) of the CCAA and developed by case law. According to the Court, the RVO is not a plan of arrangement that should be put to the vote of Nemaska Lithium's creditors. Rather, the remaining creditors will exercise their right to vote on a plan of arrangement that will be submitted to them once the proposed transaction is completed. [26]

Finally, the Court emphasized the importance of the expungement of any security, charge or other restriction contemplated by s. 36(6) of the CCAA, which was a condition to the implementation of the transaction and served to prevent the holders of those rights from vetoing the contemplated transaction.

Takeaway

For insolvent companies and insolvency practitioners, the judgment in *Nemaska Lithium* further strengthens the status of the RVO as an additional restructuring tool, which is useful to achieve the sale of an insolvent business while maintaining in force existing permits, licenses, authorizations or essential contracts, and retaining the various tax attributes of the debtor. The judgment also reaffirms that a vast range of innovative solutions are available to address commercial and social contemporary issues in the context of CCAA restructurings.

[26] *Nemaska Lithium* at paras. 85-87.

Civil Procedure

Lindsay Burgess, Kathryn Gullason and Daniel Thomas

Caal Caal v. Hudbay Minerals, 2020 ONSC 415

In this decision, the Ontario Superior Court of Justice granted leave to 11 Mayan Q'eqchi' women from a remote indigenous farming community in Eastern Guatemala to amend their Statement of Claim alleging abuses that occurred during a forced eviction from disputed lands.

The plaintiffs allege that they were sexually assaulted by private security personnel and members of the Guatemalan police and military during forced evictions from the disputed lands, which included the site of the proposed Fenix open pit nickel mine (Fenix Project). The plaintiffs each claim general, aggravated, punitive and exemplary damages.

At the time of the alleged assaults, the Fenix Project was owned and operated by a Guatemalan company, Compania Guatemalteca de Niguel S.A. (CGN), a subsidiary of Skye Resources Inc. (Skye), a Canadian company. Hudbay Minerals Inc. (Hudbay), acquired Skye in 2008.

In 2012, Hudbay brought motions to stay this action, and two related actions, on the basis that Ontario was not a convenient forum. Hudbay also brought motions to strike the actions. In 2013, Hudbay abandoned its motions to stay, and in 2013 the motions to strike were dismissed.

The plaintiffs' motion to amend their Statement of Claim was granted. This judgment represents the latest interlocutory decision in this long running litigation. Hudbay has filed an appeal of the Superior Court's decision.

Crescent Point Resources Partnership v. Husky Oil Operations Ltd., 2020 SKQB 128

In this decision, the Saskatchewan Court of Queen's Bench refused to dismiss a claim for want of prosecution, despite finding that the delay was inordinate, in part because the subject matter (environmental damage) was of such public importance that the claim should proceed.

Husky Oil Operations Ltd. (Husky) operated a salt water well and input well from 1956 to 1982, at which point in time it transferred its interest in the wells to T. Bird Oil Ltd (T. Bird). In 2012, T. Bird learned of contamination at the well sites, which it says occurred while Husky operated the wells. T. Bird issued a claim against Husky seeking compensation for remediation of the environmental damage resulting from the salt-water spills. Shortly thereafter, Crescent Point Resources Partnership (Crescent Point) acquired all of T. Bird's assets.

From 2014 to 2019, Crescent Point and Husky communicated about the claim, and Crescent Point informed Husky that it would inform it when it needed to file a statement of defence. In 2019, Crescent Point amended the claim to replace T. Bird's name with its own. It served the amended claim on Husky and Husky brought this application to dismiss the claim for want of prosecution several months later.

Although the Court found that the delay in the litigation was both inordinate and inexcusable, it concluded that it would be in the interests of justice to allow the claim to proceed. The key consideration for the Court was the nature of the case. The Court noted that environmental pollution is a serious public policy issue that has seen increased urgency over the years, and that this private litigation relating to the remediation of environmental contamination ought to proceed.

Constitutional Law

Lindsay Burgess

Attorney General of Québec v. IMTT-Québec Inc., et al, 2020 CanLII 27684

In this decision, the Supreme Court of Canada dismissed an application for leave to appeal the judgment of the Québec Court of Appeal in *Attorney General of Quebec v. IMTT-Québec inc.*, 2019 QCCA 1598, which we reported on in *Mining in the Courts,* Vol. X. This decision ends a 14-year saga and consolidates a recent line of Supreme Court of Canada decisions limiting the application of provincial environmental permit requirements to federal undertakings, such as ports, airfields and pipelines.

For more on this decision, see McCarthy Tétrault LLP's *Canadian Appeals Monitor* blog post entitled "Trio of recent Supreme Court of Canada decisions signals provinces cannot impede federal undertakings under the guise of environmental protection."

La Rose v. Canada, 2020 FC 1008 and *Mathur v. Ontario,* 2020 ONSC 6918

In these decisions, the Federal Court and the Ontario Superior Court of Justice grappled with motions from Canada and the province of Ontario, respectively, to strike claims brought by Canadian youth in respect of climate change and *Charter* rights.

In *La Rose v. Canada*, 15 Canadian children and youth commenced a claim against the Federal Government and the Attorney General of Canada (Canada) alleging that they had breached ss. 7 and 15 of the *Charter*, as well as the novel "public trust doctrine," by causing, contributing to, or allowing greenhouse gas emissions at levels inconsistent with a stable climate system. The decision dealt with a motion by Canada to strike the claim without leave to amend.

The Federal Court granted the motion to strike. In doing so, it held that the *Charter* claims were non-justiciable because they sought broad and diffuse remedies that required the Courts to perform a public policy function, rather than a judicial one. This was not a claim seeking a review of a particular law or state action and was more appropriately characterized as a request for the court to involve itself in Canada's climate change policy in a way that was inconsistent with the court's constitutional role. Further, the *Charter* claims did not disclose a reasonable cause of action as they did not impugn a specific enough state action or law, and *Charter* protections cannot operate in the abstract.

The public trust doctrine claim was justiciable as it disclosed a question of law and did not engage the same concerns with respect to the division of powers. However, it did not disclose a reasonable cause of action, but rather was "an 'outcome' in search of a 'cause of action'" (para. 88). This was not a novel claim as it had been consistently rejected under Canadian law, thus, it was appropriate to strike it on a preliminary motion.

In *Mathur v. Ontario*, the Ontario Superior Court of Justice reached a different result on the basis of more precise pleadings. In that case, a group of seven Ontario youth brought an application against Ontario seeking declaratory and mandatory orders relating to Ontario's target and plan for the reduction of greenhouse gas (GHG) emissions in the province. In particular, the applicants challenged Ontario's repealing of the *Climate Change Act* through the *Cancellation Act*, and the newly enacted target thereunder. The applicants alleged that the target is too lenient, and that Ontario's failure to impose sufficiently stringent targets infringes the constitutional rights of youths and future generations under ss. 7 and 15 of the *Charter*. The decision dealt with a motion by Ontario to strike the application.

The Court dismissed Ontario's motion. In doing so, it noted that the earlier decision in *La Rose* did not bind the Court and in any event was distinguishable. Unlike *La Rose*, where the plaintiffs had essentially challenged Canada's overall approach to climate change, the application in this case challenged specific legislation (the *Cancellation Act*) and government action (the target and plan). As such, the Court held the application was *prima facie* justiciable. In addition, the novelty of the *Charter* claims was not a bar to them proceeding unless it could be established that the claims were unsustainable, which the Court found was not the case here.

Québec (Attorney General) v. 9147-0732 Québec inc., 2020 SCC 32

In this decision, the Supreme Court of Canada confirmed that the *Charter* only protects individuals, not corporations, from cruel and unusual treatment or punishment.

9147-0732 Québec inc. (Québec inc.), a construction company, was found guilty of operating without the required licence and was fined under s. 197.1 of Québec's *Building Act*. Québec inc. argued that the fine was unconstitutional because it constituted cruel and unusual punishment. Section 12 of the *Charter* provides that "[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment."

The Court of Québec and subsequently the Québec Superior Court (on appeal) both dismissed Québec inc.'s constitutional challenge, finding that s. 12 does not apply to corporations. The Québec Court of Appeal reversed the Superior Court's decision, concluding that corporations could face cruel treatment or punishment through the imposition of harsh or severe fines.

The Attorney General of Québec appealed, and a majority of the Supreme Court of Canada allowed the appeal. The majority held that s. 12 does not apply to corporations because the purpose of s. 12 is to protect human dignity, and the text of s. 12, particularly the term "cruel and unusual," refers to human pain and suffering that only human beings can experience. Therefore, legal entities such as corporations or inanimate objects are not protected by s. 12.

Corporations are "legal persons," and certain *Charter* rights apply to them, such as the right to be free from unreasonable search and seizure. However, as the Supreme Court of Canada's decision in this case makes clear, corporations are not protected by all *Charter* rights.

For more on this decision, see McCarthy Tétrault LLP's *Canadian Appeals Monitor* blog post entitled "Supreme Court of Canada holds that the constitutional protection against cruel and unusual treatment or punishment does not extend to corporations."

Reference re Environmental Management Act (British Columbia), 2020 SCC 1

In this decision, the Supreme Court of Canada (SCC) unanimously dismissed an appeal by the province of British Columbia (B.C.) in which B.C. sought to resurrect its proposed anti-pipeline legislation. The SCC dismissed the appeal from the bench, for the unanimous reasons of the British Columbia Court of Appeal in *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181, which we reported on in *Mining in the Courts*, Vol. X. As we previously reported, the Court of Appeal found that the legislation proposed by B.C. was unconstitutional, reaffirming Parliament's exclusive authority over interprovincial undertakings.

For more on this decision, see McCarthy Tétrault LLP's *Canadian Energy Perspectives* blog post entitled "The Supreme Court of Canada has dismissed B.C.'s attempt to block the Trans Mountain Pipeline: here's what you need to know."

Reference re Greenhouse Gas Pollution Pricing Act, 2020 ABCA 74

This was a reference decision to the Alberta Court of Appeal on the constitutionality of the Federal *Greenhouse Gas Pollution Pricing Act* (GGPPA). A majority of the Court held that the GGPPA was unconstitutional.

The GGPPA, which was passed by Parliament in 2018, imposes a levy on various fossil fuels and sets greenhouse gas (GHG) limits on large industrial emitters such as mines and petroleum processing facilities. In 2019, the Alberta government referred the GGPPA to the Court to determine if it is unconstitutional. This was not the first time the question has been raised by a provincial government. In *Mining in the Courts*, Vol. X, we reported on *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 and *Reference re Greenhouse Pollution Pricing Act*, 2019 ONCA 544, in which split decisions from the Saskatchewan and Ontario Courts of Appeal upheld the constitutionality of the GGPPA. In Alberta, the Court of Appeal went the opposite direction, the majority holding that the GGPPA is unconstitutional. Focusing on what it characterized as Canada's unique federalist framework, the majority found the GGPPA to be a deep intrusion into the provinces' exclusive jurisdiction under a number of provincial heads of power including property and civil rights and the power to manage natural resources.

The final word on the GGPPA is yet to come. All three decisions were appealed to the Supreme Court of Canada, which is expected to release its decision in 2021.

For more on this decision, see McCarthy Tétrault LLP's *Canadian ERA Perspectives* blog post entitled "On the Path to the Supreme Court – Alberta Court of Appeal Rules Federal Carbon Pricing Legislation Unconstitutional."

Article

Developments in Canadian Arbitration Law in 2020

Meghan S. Bridges

In 2020, Canadian courts provided guidance on two important topics in arbitration law: (i) the timeliness of steps taken in respect of arbitral proceedings; and (ii) the standard of review on appeal of an arbitral decision. While the latter is more relevant to domestic arbitrations than international arbitrations, the former is relevant to all businesses engaged in arbitration in Canada, whether that arbitration is domestic or international.

The Importance of Timeliness

Two Canadian cases from the last year reinforced the importance of proceeding in a timely fashion if parties wish to retain the benefit of an arbitration clause.

Paulpillai v. Yusuf (Paulpillai),[27] released early in 2020, serves as a warning to parties who have an arbitration agreement or clause that they must move quickly if seeking a stay of court proceedings in favour of arbitration. Mr. Yusuf and Mr. Paulpillai were business partners. Their partnership agreement contained an arbitration clause providing that they would arbitrate any dispute between them. After Mr. Paulpillai passed away, a dispute arose between Mr. Yusuf and Mr. Paulpillai's estate. Mr. Paulpillai's estate eventually commenced a court application. The parties appeared in court twice over seven months on interlocutory motions and exchanged multiple rounds of affidavit evidence. After the application was heard, Mr. Yusuf sought to stay the court proceeding on the basis of the arbitration agreement.

The Court declined to stay the application in favour of arbitration because the motion was not made in a timely manner. Both parties had appeared in court, brought their own motions, and filed extensive evidence without moving to stay the proceeding in favour of arbitration. But the Court concluded by urging the parties to reconsider their decision not to proceed by way of arbitration, reinforcing the principle that arbitration is rooted in the consent of both parties. In particular, the Court noted that arbitration would permit the issues to be adjudicated in a more timely way and on terms that would facilitate the multijurisdictional nature of the dispute.[28]

Comren Contracting Inc. v. Bouygues Building Canada Inc.,[29] similarly serves as a reminder about the importance of complying with timelines set out in an arbitration agreement. In that case, the Nunavut Court of Justice concluded that Bouygues Building Canada Inc. (Bouygues) was not bound by an arbitration clause in a construction subcontract because Comren Contracting Inc. (Comren) failed to give notice within 10 working days of the date the dispute arose, as required by the arbitration clause. The Nunavut Court further noted that Bouygues had not waived the requirement to comply with the timelines in the arbitration clause.

Both cases also serve as a reminder that arbitration is fundamentally a process based on consent. Arbitration clauses, including timelines or schedules within them, can be varied by mutual consent of the parties. Additionally, parties may agree to forego or stay court proceedings in favour of arbitration at any point in the litigation process. Timeliness generally becomes an issue when mutual consent is not forthcoming and one party seeks to impose arbitration on the other pursuant to their agreement.

Standard of Review on Appeal of an Arbitral Decision

We reported on the *Vavilov* trilogy[30] in *Mining in the Courts*, Vol. X. For many decades, the standard of review of a commercial arbitration decision on appeal to any court in Canada has been reasonableness. But following the release of the *Vavilov* trilogy in 2019, which revised the framework for judicial review of decisions of administrative tribunals, there appears to be some confusion about whether the standard of review for appeals of arbitration decisions has changed, and whether *Vavilov* was intended to apply to the arbitration context at all. The Manitoba Court of Queen's Bench applied *Vavilov* to conclude that the standard of review of arbitral decisions is now correctness. The Alberta Court of Queen's Bench disagreed that *Vavilov* applied to arbitral decisions, and concluded the standard of review remains reasonableness. The Ontario Superior Court of Justice implicitly applied the *Vavilov* framework to an application to set aside an arbitral decision, but concluded the framework led to a standard of review of reasonableness.

Courts must now presumptively review all decisions of administrative tribunals on the "reasonableness" standard,

[27] 2020 ONSC 851.

[28] *Paulpillai* at para. 93.

[29] *Comren Contracting Inc. v. Bouygues Building Canada Inc.*, 2020 NUCJ 2

[30] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65; *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66.

unless one of two conditions applies: (i) the legislature has indicated that a different standard of review should apply either by prescribing the standard of review by statute or by providing a statutory appeal mechanism; or (ii) the rule of law requires that the "correctness" standard apply because the decision raises a constitutional question, a general question of law of central importance to the legal system, or a question related to jurisdictional boundaries between two or more administrative bodies.

In *Buffalo Point First Nation v. Cottage Owners Association*,[31] the Manitoba Court of Queen's Bench concluded that the standard of review for an arbitral decision on an extricable question of law is now correctness. This decision arose in the context of Manitoba's domestic arbitration legislation, *The Arbitration Act*.[32] Buffalo Point First Nation sought leave to appeal various aspects of an arbitral award to the Manitoba Court of Queen's Bench. The arbitration agreement was silent as to the right of appeal; as a result, s. 44(2) of *The Arbitration Act* governed. That section reads:

> 44(2) If the arbitration agreement (other than a family arbitration agreement) does not provide that the parties may appeal an award to the court on a question of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that:
>
> **(i)** the importance to the parties of the matters at stake in the arbitration justifies an appeal; and
>
> **(ii)** determination of the question of law at issue will significantly affect the rights of the parties.

After setting out the parties' positions on whether the dispute concerned a question of law, the Court turned to the standard of review. Citing *Vavilov*, the Court concluded that section 44(2) of *The Arbitration Act* amounted to the legislature providing a "statutory appeal mechanism from an administrative decision to a court," which "signall[ed] the legislature's intent that appellate standards apply when a court reviews the decision."[33] As a result, the Court concluded that the standard of review of the arbitral award should be the appellate standard of correctness, not the reasonableness standard. The Court then relied on this standard in finding the "arguable case" test for leave to appeal the arbitral award was met, noting that "with the new direction from the Supreme Court, the standard of review is not the more flexible reasonableness standard but rather the question will be considered on the appellate standard of correctness (*Vavilov* at para. 37)."[34]

Notably, the *Buffalo Point* Court reached these conclusions despite recognizing that the *Vavilov* trilogy was released well after oral argument, and neither party had addressed whether it applied.

Less than two weeks after the release of *Buffalo Point*, the Alberta Court of Queen's Bench came to the opposite conclusion in *Cove Contracting Ltd. v. Condominium Corporation No. 0125598 (Ravine Park)*.[35] Relying on the Supreme Court of Canada's previous decisions in *Sattva Capital Corp. v. Creston Moly Corp*.[36] and *Teal Cedar Products Ltd. v. British Columbia*,[37] the Court held that *Vavilov* did not change the standard of review for commercial arbitration appeals, which remains reasonableness unless a constitutional issue or an issue of central importance to the legal system as a whole has been raised. The Court observed that the *Vavilov* framework was based on the intentions of legislatures as expressed in statutes creating administrative bodies and dispute resolution processes. The same analysis does not apply in the arbitration context, where parties voluntarily agree by way of contract to participate in arbitration as a means of dispute resolution. The Court also concluded *Vavilov* did not apply to arbitrations because the Supreme Court did not refer, in any of the *Vavilov* trilogy decisions, to its earlier decisions in *Teal Cedar* and *Sattva* establishing that reasonableness is the presumptive standard of review for commercial arbitration appeals. The Court reasoned that if the Supreme Court had intended to reverse its own decisions, it would have done so expressly.

In *Freedman v. Freedman Holdings Inc.*,[38] the Ontario Superior Court of Justice had an opportunity to weigh in

[31] 2020 MBQB 20 [*Buffalo Point*].
[32] C.C.S.M. c. 120.
[33] *Buffalo Point* at para. 47.
[34] *Buffalo Point* at para. 56.
[35] 2020 ABQB 106.
[36] 2014 SCC 53.
[37] 2017 SCC 32.
[38] 2020 ONSC 2692.

on the debate. At issue was the appropriate standard of review under s. 46(1) of Ontario's *Arbitration Act, 1991,*[39] pursuant to which a Court may set aside an arbitral award. Although the Ontario court did not cite *Vavilov* as a conclusive authority on the matter, it reasoned by analogy and applied the *Vavilov* framework when concluding that reasonableness is the appropriate standard of review under s. 46(1). The Court stated that the Supreme Court's comments in *Vavilov* about the merits of simplifying the standard for judicial review in administrative tribunals were analogous to this context. The Court embraced the similarity between jurisdictional questions (and by extension, questions of procedural fairness) in the administrative review context and the arbitration context. Given the similarity between the two contexts, the Court concluded reasonableness was the appropriate standard of review.

The Manitoba Court's conclusion in *Buffalo Point* that the correctness standard applies to appeals of arbitral decisions is a significant departure from past case law holding that arbitration decisions are reviewable on a standard of reasonableness. Subjecting arbitral decisions to a correctness review, rather than a reasonableness review, has the potential to undermine the important benefits of commercial arbitration that have been consistently recognized by courts in Canada. Whether this standard of review will hold — either on appeal or in future Manitoba cases — remains to be seen. For now, it appears that courts in at least two other provinces are reluctant to change the standard of review of an arbitral decision from reasonableness to correctness.

It is also questionable whether the Manitoba Court's analysis in *Buffalo Point* would apply at all in the context of international arbitrations, which are subject to their own statutory regimes under Canadian law. Manitoba's *International Commercial Arbitration Act*[40] and international arbitration legislation enacted in other provinces adopt the UNCITRAL Model Law on International Commercial Arbitration[41] as the law of the province in the context of international arbitrations. Appeals are more tightly circumscribed under the Model Law. Indeed, Manitoba's *International Commercial Arbitration Act* does not contain any statutory right of appeal, unlike *The Arbitration Act*; as a result, the Manitoba Court's reasoning that correctness applies by virtue of the statutory right of appeal would not apply to that *Act*.

[39] S.O. 1991, c.17.

[40] C.C.S.M. c. C151.

[41] https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration

Case Law Summaries

Contracts

Kathryn Gullason

All-Terrain Track Sales and Services Ltd. v. 798839 Ontario Limited, 2020 ONCA 129

In this decision, the Ontario Court of Appeal denied a judgment creditor's attempt to execute on a judgment by enforcing certain rights under an option agreement between the judgment debtor and a third party relating to a mining property.

The plaintiffs, All-Terrain Track Sales and Services Ltd. and its owner (All-Terrain), are judgment creditors of 798839 Ontario Limited (39). After being unable to execute on a judgment against 39, All-Terrain sought to enforce rights under an option agreement between 39 and Great Lakes Nickel Limited (GLN) relating to a mining project in Pardee Township in northern Ontario (the Project). All-Terrain brought a motion for partial summary judgment to determine what 39's rights were under the option agreement.

The option agreement provided that 39 had an option to acquire an interest in the Project property, but the option would terminate if 39 failed to expend C$2 million in the aggregate on the Project. 39 had entered into a management contract with James Bay Company Mineral Resources Inc. (JBC) to manage the exploration and development of the Project claims and had advanced C$2 million in respect of that agreement. However, a portion of the amount advanced was diverted to projects other than the Project. All-Terrain argued that 39 had validly exercised its option by expending C$2 million, or alternatively, that 39 was entitled to a stake in the joint venture proportional to what it expended in relation to the Project.

The motion judge concluded that 39 had failed to satisfy the contractual prerequisite for exercising the option, as it had not advanced C$2 million towards the Project and it did not have a right to a smaller stake if it advanced less than the required amount.

All-Terrain appealed, arguing that the motion judge failed to consider the factual matrix surrounding the formation of the option agreement. The Ontario Court of Appeal dismissed the appeal, finding that the motion judge had considered the relevant facts before her (that is, those facts that the parties were aware of when forming the contract) and that her interpretation of the contract was rational and rooted in the language of the contract and the evidence before her.

Corex Resources Ltd. v. 2928419 Manitoba Ltd., 2020 MBQB 47

In this decision, the Manitoba Court of Queen's Bench considered whether a lessee under a petroleum and natural gas lease had been engaged in "working operations," and could therefore avoid termination of the lease due to non-production.

In 1950, the British American Oil Company acquired a leasehold interest in certain mines and minerals in Manitoba, and in 1992, assigned the lease to 2928419 Manitoba Ltd. (292) (292 Lease). The owners of the mines and minerals in question entered into two new leases with different companies in 2018 and 2019, both of which were later assigned to Corex Resources Ltd. (Corex). Corex sought a declaration that the 292 Lease was terminated, while 292 took the position that the 292 Lease remained in full force and effect.

The initial term of the 292 Lease was 10 years. Continuation after the initial term depended on continued production of the leased substances. If production ceased, the 292 Lease terminated unless 292 could establish that it was engaged in "working operations," which were defined as "meaningful activities directed to bringing about production of the leased substances." Any delay or interruption in 292's pursuit of working operations caused by circumstances outside of its control would not trigger termination.

In this case, 292 experienced a lengthy period of non-production from November 2016 to October 2018, during which it remediated several spills and performed electrical work. Although the Court acknowledged that 292 had invested a significant sum in doing so, the Court stated that it is not the cost of the activities that determines whether the lease continues, but whether the activities themselves are directed at bringing about production of the leased substances.

The Court found that remediation of spills caused by operator error and electrical work was not work directed at the production of the leased substances. The Court also held that 292 had not satisfied its onus to show that any interruptions or delays in its pursuit of "working operations" were due to circumstances beyond its control. In the result, the Court found that 292's lease had terminated in October 2018 due to non-production, and ordered 292 to disgorge its net revenues received in respect of the leased substances for the period following its termination, allowing a deduction for the costs of production, gathering, and processing.

Kaban Resources Inc. v. Goldcorp Inc., 2020 BCSC 1307

In this decision, the British Columbia Supreme Court confirmed that the court may recognize implied terms in a contract if the agreement between the parties would not be commercially efficacious without them.

Goldcorp Inc., and two of its subsidiaries (now Newmont Corp.) (Goldcorp), brought a summary trial application for an order dismissing the claim commenced against them by Kaban Resources Inc. (Kaban). The action arose in the context of the sale of Goldcorp's Cerro Blanco gold-silver mine in Guatemala and certain other assets (Cerro Blanco). In 2015,

Goldcorp entered into an exclusivity agreement with RedZone Resources Ltd. (RedZone), whereby Goldcorp agreed to negotiate exclusively with RedZone regarding the acquisition of Cerro Blanco for 30 days. Goldcorp and RedZone agreed to structure the sale of Cerro Blanco in a particular way, including that Goldcorp would transfer its rights in Cerro Blanco to a newly incorporated private company, being Kaban. The agreed terms were recorded in a letter agreement between Goldcorp and Kaban (Letter Agreement).

Under the Letter Agreement, Kaban was responsible for raising the initial financing for the Cerro Blanco project. Kaban ultimately entered into a financing agreement with Fortuna Silver Mines Inc. (Fortuna Agreement),

which was subject to Goldcorp's consent, among other conditions. Goldcorp refused to consent to the Fortuna Agreement on the basis that it was inconsistent with the terms of the Letter Agreement, including that: (i) the founders of Kaban would remain actively involved in the development and management of Cerro Blanco; and (ii) the C$35 million raised in financing would be invested into the development of Cerro Blanco (Implied Terms). Goldcorp indicated its willingness to continue to work with Kaban to close the Letter Agreement, despite its rejection of the Fortuna Agreement.

The British Columbia Supreme Court held that the Letter Agreement was subject to the Implied Terms, and dismissed Kaban's claim. In doing so, the Court applied a business efficacy test, finding that the Letter Agreement would not be commercially efficacious without the Implied Terms. The Court found that the Fortuna Agreement sought to both vary central terms of the Letter Agreement and to impose additional obligations on Goldcorp that were not contemplated by the Letter Agreement. Goldcorp's refusal to consent to the Fortuna Agreement thus did not constitute a breach of its duty to perform the Letter Agreement and it did not defeat the objects of the Letter Agreement, particularly in view of Goldcorp's continued willingness to work with Kaban.

Kaban appealed the decision, but the B.C. Court of Appeal stayed the appeal pending Kaban posting security for Goldcorp's costs in both the appeal and the proceedings below.[42] At time of writing, the appeal is proceeding but the hearing of the appeal has not been scheduled.

Shepherd v. Lundin Gold Inc., 2020 BCSC 258

In this decision, the British Columbia Supreme Court denied the plaintiff's claim to a finder's fee in relation to the acquisition of the Fruta del Norte deposit (FdN) in Ecuador, one of the most valuable gold deposits in the world, by Lundin Gold Inc. (Lundin Gold).

The plaintiff, Charles Carter Shepherd (Shepherd), commenced an action for breach of contract against the defendants, Lundin Mining Corporation (Lundin Mining) and Lundin Gold, seeking payment of a US$12 million finder's fee in relation to Lundin Gold's acquisition of FdN.

Shepherd alleged that he entered into an oral agreement with William Rand (Rand), a director of Lundin Mining, to lobby the Ecuadorian government regarding the purchase of FdN, and that Rand offered him a 5% finder's fee for

[42] See *Kaban Resources Inc. v. Goldcorp Inc.*, 2021 BCCA 6.

doing so. The Lundin defendants denied entering into any agreement with Shepherd and brought a counterclaim against Shepherd for passing off Lundin Mining's name and logo in certain correspondence with Ecuadorian government officials.

The Court concluded that there was an oral contract between Shepherd and Lundin Mining, with the following terms: (i) Shepherd would lobby on behalf of an Ecuadorian company called EcuaCondor to obtain FdN; (ii) Shepherd would be given some authority to legitimize the proposal with Lundin Mining's name and logo; and (iii) if EcuaCondor acquired FdN, EcuaCondor would contract with Lundin Mining to extract the ore and Shepherd would be entitled to a finder's fee.

Since the terms of the contract between Shepherd and Lundin Mining were not documented, the Court was required to find its terms on the basis of the documents in evidence, the testimony of witnesses, and the conduct of the parties after its formation. The Court also considered the commercial realities, such as the fact that a finder's fee of 5%, as alleged by Shepherd, would be unusually high and that Canadian mining companies rarely use third parties to work with foreign governments due to concerns about corruption and kickbacks. The Court found it was more likely to be a finder's fee in the order of 0.5%. However, Shepherd had not satisfied the terms of the oral agreement to earn the finder's fee, since EcuaCondor did not acquire FdN and could not contract with Lundin Mining to extract the ore. The Court therefore dismissed Shepherd's claim. The defendants' counterclaim was also dismissed.

Criminal and Regulatory Infractions

Daniel Thomas, Alexis Hudon, Caroline-Ariane Bernier and Kathryn Gullason

Commission des normes, de l'équité, de la santé et de la sécurité du travail c. Mines Agnico Eagle ltée, 2020 QCCQ 1765

In this decision, the Court of Québec held that an emulsion loader containing a large quantity of explosives fell within the definition of "motorized equipment" and was therefore subject to certain regulations regarding the supervision of explosives under the *Règlement sur la santé et la sécurité du travail dans les mines* (Regulation).

During an inspection at the Laronde Mine (Mine), an inspector for the Commission observed an unsupervised emulsion loader containing explosives. The inspector issued a statement of offence to the Mine for contravening ss. 415 and 415.1 of the Regulation, which requires motorized vehicles and equipment containing more than 25 kg of explosives to be supervised. The defendant Mine owner argued that the Regulation did not apply because the emulsion loader was not a motorized vehicle or motorized equipment.

The Court held that the emulsion loader did fall within the ordinary meaning of "motorized equipment" and the defendant was found guilty of the offence.

Since the phrases "motorized vehicle" and "motorized equipment" are not defined in the Regulation, the Court looked to their ordinary meaning. It concluded that the phrase "motorized equipment" does not require that the engine permit the equipment to move, but merely that it be equipped with an engine. The emulsion loader did not fall within the category of "motorized vehicle," since it was towed by another vehicle to various sites within the Mine. However, it did have both a hydraulic and electric engine for the purpose of pumping emulsion. Therefore, the Court concluded that the emulsion loader was "motorized equipment" and had to be supervised if it contained over 25 kg of explosives.

R. c. ArcelorMittal Canada inc., 2020 QCCQ 698

In this decision, the Court of Québec excluded certain documents from the evidence that an employee of ArcelorMittal Mining Canada (ArcelorMittal) provided to Environment Canada investigators (EC) without authorization.

ArcelorMittal was charged under the *Fisheries Act* with depositing deleterious substances and making false statements. During the investigation, EC's investigators met with several employees of ArcelorMittal. All such meetings occurred in the presence of ArcelorMittal's counsel, except for a meeting where an employee provided documents to the investigator and executed a consent to a warrantless search. Other documents were provided afterward by ArcelorMittal in response to an information request made by EC.

ArcelorMittal claimed that the employee did not have the authority to provide EC with the documents and that the company had not freely consented to providing the information requested by EC because it was not aware that such request was based on documents made available to EC by the employee, without the knowledge or authorization of ArcelorMittal. ArcelorMittal argued the evidence should therefore be excluded under ss. 8 and 24 of the *Charter*.

The Court agreed, holding that even if the documents were located on the computer of the employee, they did not belong to her, but to ArcelorMittal, who had a reasonable expectation of privacy with regards to them. The employee did not have authority to consent to the search on behalf of ArcelorMittal. The documents provided by the employee should thus be excluded from the evidence.

However, the Court found that this conclusion did not vitiate ArcelorMittal's consent to EC's subsequent request for information nor did the receipt of documents from ArcelorMittal following such request infringe on s. 8 of the *Charter*. The requests, made in writing by EC, clearly explained the context and potential uses EC would make of the information. It gave ArcelorMittal all the information required to make an informed decision.

R. v. Mossman, 2020 BCCA 299

In this decision, the British Columbia Court of Appeal considered the admissibility of certain statements made by two accused charged with multiple regulatory offences, and confirmed that investigations of regulatory offences are subject to a lower standard of *Charter* protection.

Two senior managers of a gold mine in British Columbia were charged with multiple offences under the *Fisheries Act*, the B.C. *Environmental Management Act* and the B.C. *Water Sustainability Act* in relation to spills that occurred at the mine. At trial before the British Columbia Provincial Court, the accused argued that certain evidence, including

statements gathered by investigators, was gathered in breach of their *Charter* rights and should be excluded. The trial judge concluded that the interviewing officer gave the accused mixed messages, telling them that they did not have to say anything, but also reminding them that they were required to provide information in the context of a regulatory investigation under various statutes. The trial judge admitted the accused's statements relating to regulatory fact gathering, but excluded any inquiry directed towards whether an offence had occurred, which violated the accused's s. 7 *Charter* rights against self-incrimination.

On appeal to the British Columbia Supreme Court, the Court found that the trial judge erred in admitting certain statements and excluding others, and ordered a new trial. The Court held that attempting to identify a "point in time" at which the officers' inquiry became an investigation for the purpose of determining the applicability of the *Charter* was not the appropriate approach. The proper approach was to determine whether regulatory inspection powers were exercised reasonably in the "totality of the circumstances."

The accused sought leave to appeal to the British Columbia Court of Appeal but leave was denied. In denying leave, the Court of Appeal noted, among other things, that regulatory and criminal offences must be treated differently for the purposes of *Charter* review. In the regulatory context, when considering the admissibility of compelled statements, the accused's interest in being free from self-incrimination must be balanced against the public interest in the proper regulation and control of a licensed activity that has the potential to cause harm to people and the environment. In many regulatory settings, such as mining, the individual freely chooses to participate in the industry, and reports and inspections are conditions of that participation. Therefore, investigations in the context of regulatory offences are subject to a lower standard of *Charter* scrutiny because they engage different interests and a different level of compulsion.

Article

Shifting With the Winds of Change: Update on Climate Change Disclosure in the Metals and Mining Sector

Selina Lee-Andersen

In recent years, investors and shareholders have been calling for greater action on climate change which delivers positive returns on investment. This, in turn, has increased pressure on resource development companies to assess and better communicate environmental, social and governance (ESG) risks, particularly the risks associated with the impacts of climate change. A proliferation of investor-led initiatives such as the Institutional Investors' Expectations of Corporate Climate Risk Management and the Investor Agenda have been aimed at addressing risk management issues within the context of climate change, such as how business plans will fare in a low-carbon future and the fate of potential stranded assets. These initiatives are driving the need for more reliable and consistent information. As a result, corporate disclosure of climate change-related matters is becoming an increasingly important tool to help companies and investors better understand environmental risks and opportunities.

Leading the Way: TCFD Recommendations

Each sector faces climate-related risks. In the Canadian metals and mining sector, higher precipitation, warmer temperatures, and the increasing frequency of intense weather events are expected to impact operations across the country. While mining companies have started to disclose climate-related risks, investors are seeking more meaningful and consistent disclosures. The recommendations from the Financial Stability Board's Task Force on Climate-related Financial Disclosures (TCFD) are quickly becoming the global standard in this area. Specifically, TCFD has developed four voluntary recommendations on climate-related financial disclosures that can be applied to organizations across sectors and jurisdictions. The recommendations are structured around four main themes (each of which sets out specific recommended disclosures):

1. **Governance** – disclosure of the organization's governance around climate-related risks and opportunities (e.g. board oversight for climate-related matters).
2. **Strategy** – disclosure of the actual and potential impacts of climate-related risks and opportunities on the organization's businesses, strategy, and financial planning where such information is material (e.g. identification of climate-related risks and opportunities over the short, medium, and long term).
3. **Risk Management** – disclosure of how the organization identifies, assesses, and manages climate-related risks (e.g. organization's processes for managing climate-related risks).
4. **Metrics and Targets** – disclosure of the metrics and targets used to assess and manage relevant climate-related risks and opportunities where such information is material (e.g. disclosure of Scope 1, Scope 2, and Scope 3 (if appropriate) greenhouse gas emissions and related risks).

In addition, TCFD has developed seven principles for effective disclosure, which are included in its guide to Implementing the Recommendations of the Task Force on Climate-related Financial Disclosures (the Implementation Guide) and are designed to help guide climate-related financial reporting. In particular, the principles support the achievement of high-quality and decision-useful disclosures that enable users to understand the impact of climate-related risks and opportunities on organizations.

Understanding the Nature of the Risk

In the Implementation Guide, TCFD has included supplemental guidance for both financial and non-financial sectors. Metals and mining are included under the category of Materials and Buildings. TCFD describes industries in the Materials and Buildings group as typically capital intensive, requiring high investment in equipment and buildings that are relatively fixed in terms of location, and dependent on sources of raw and refined materials. These characteristics may reduce the flexibility of organizations to adapt to climate change risks. In addition, TCFD notes that this group's activities result in financial exposures around high greenhouse gas (GHG) emissions and energy consumption. Industries in this group may also be dependent on water availability and/or vulnerable to the effects of acute or chronic physical risks from weather events.

Recommended Scope of Disclosures for Metals and Mining

TCFD notes that since the Materials and Buildings group is capital intensive and facilities have a long lifespan, accelerated research, development, demonstration and deployment (R&DDD) is critical. Therefore, disclosures relating to R&DDD plans and progress are valuable to see the current and future situation and risks of organizations within this group. Further, TCFD notes that disclosures should focus on qualitative and quantitative assessments and potential impacts of the following:

- stricter constraints on emissions and/or pricing carbon emissions and related impact on costs; and
- opportunities for products or services that improve efficiency, reduce energy use, and support closed-loop product solutions.

In terms of key metrics, TCFD recommends the disclosure of information relating to the implications of GHG emissions, energy and water on the financial aspects related to revenue, costs, assets and financing costs. Table 5 of the Implementation Guide highlights several examples that TCFD has developed for the metals and mining industry specifically.

Where are we now?

In TCFD's 2020 Status Report, it was found that worldwide, energy companies and materials and buildings companies are leading on disclosure, with an average level of TCFD-aligned disclosures of 40% for energy companies and 30% for materials and buildings companies in fiscal year 2019. TCFD's finding was based on a review of 1,700 companies' reports, which also found that the industries considered most exposed to material climate risk have led with the highest levels of TCFD disclosure.

In the 2019 EY Global Risk Disclosure Barometer, EY concluded that although the mining sector was previously a top performer (when compared with EY's 2018 analysis), the sector has since seen a marked decrease in the overall quality and coverage of climate-related financial disclosures by companies. EY noted that this could partly be explained by the incorporation of companies (with lower overall quality scores) from additional markets into its analysis, rather than any loss of ground by companies previously covered. Within the sector, EY found that a significant gap has appeared between the leaders and laggards, with two-thirds of companies achieving a quality score of 32%; in comparison, only 15% of companies achieved an overall quality score of more than 70%. EY noted that within the group of top performing companies, the high scores can be attributed to strong governance frameworks in the industry (including the Extractive Industries Transparency Initiative and the International Council on Mining and Metals). Canada, Australia and Brazil are considered leading markets in this sector. Information that top-performing companies disclosed included the following:

- interactions between the board and management;
- the board's role in the climate risk management process;
- a clear articulation of the management process for monitoring and reviewing current and emerging climate-related issues;
- development of long-term scenarios to test the resilience of their portfolios under various settings (including a two-degree Celsius scenario aligned with the International Energy Association's world energy model); and
- disclosure of data on Scope 3 emissions.

Closer to home, CPA Canada (with the support of Natural Resources Canada's Climate Change Adaptation Program) convened a roundtable of Canadian finance and investor relations professionals from the mining sector in May 2019 to identify disclosure trends for the sector. The discussion focused on the TCFD recommendations and a series of interviews with institutional investors to gauge how they are using climate-related information and the specific types of information they are seeking from companies. In its Roundtable Report, CPA Canada summarized the highlights of the discussion as follows:

- **Climate-related issues have the potential to be material and should be easy to find — so say Canada's institutional investors:** While mining companies produce comprehensive sustainability reports and/or report GHG emissions through voluntary programs such as CDP and the Global Reporting Initiative, there is limited climate-related financial disclosure in mainstream financial filings (e.g., regulatory filings, financial statements). Institutional investors interviewed by CPA Canada stated that they view climate-related risks as pervading all sectors and geographies. As a result, the default view is that climate-related issues are material unless otherwise demonstrated. CPA Canada learned that institutional investors are turning to third-party data providers to purchase climate-related financial information, which roundtable participants saw as a cause for concern because institutional investors may be making decisions without the appropriate context.
- **Integrating climate-related disclosures into mainstream financial reporting:** All of the institutional investors interviewed by CPA Canada indicated that they have positions in the materials sector. Many of these institutional investors

also indicated that they are signatories with the Responsible Investment Association (RIA) and/or the Principles of Responsible Investment (PRI), which require asset owners to demonstrate they are applying ESG factors into the selection and management of investments. In order for asset owners/institutional investors to meet their own reporting requirements, they require information from their investees. In particular, investors want to better understand a company's climate risk assessment process and the governance structure around that process. As a result, it is getting harder to keep sustainability and financial reporting functions separate. Many of the roundtable participants indicated that finance should be involved in conducting materiality and risk assessments of climate-related issues and setting targets, but this is not currently happening. It is expected that once finance is involved, the inclusion of relevant climate-related disclosures within mainstream financial filings will be more straightforward.

- **The need for structure and standards:** CPA Canada noted that perhaps the greatest challenge to incorporating climate-related disclosures in financial statements is the lack of clear understanding of how to define and document materiality and risk assessment as they pertain to climate-related issues. Roundtable participants expressed concern that increased disclosures could lead to an overreaction in terms of the likelihood of that risk.
- **Too much data, not enough clarity:** CPA Canada noted that for many roundtable participants, TCFD is one more reporting framework among a growing list of initiatives they are already complying with. As a result, the consolidation and integration of reporting requirements will make it easier for both companies and investors.
- **Where will the final push to make climate-related disclosures a requirement come from?** Roundtable participants are increasingly facing questions from their boards about climate-related disclosure requirements and the risk assessment process. Whether the requirements come from governments, regulators or investors, there is a clear need for guidance.

Where to from here?

Currently, the most commonly disclosed climate metrics in the metals and mining sector are Scope 1 and 2 GHG emissions, as well as targets aimed at reducing these emissions. Although these metrics are useful in providing insights into a company's direct efforts to mitigate climate change, they do not provide insights into whether these are the most material climate-related impacts in the company's supply chain. As a starting point, companies need to conduct a scenario analysis that will take into account both physical and transitional impacts. The physical impacts of climate change include changes in temperature, precipitation, snow cover and sea levels. The transitional impacts of climate change include economic changes, such as impacts to growth, costs of doing business, and shifts in asset values. According to TCFD, scenario analysis can help organizations consider a broader range of assumptions, uncertainties, and potential future states when assessing the financial implications of climate change.

Weighing the Need for Mandatory Disclosures

In the quest for consistent, clear and comparable information, investor groups are ramping up calls for mandatory climate disclosures. For example, the UK's Investment Association (which represents investors with more than £8.5 trillion in assets) recently asked all FTSE-share companies on its reports to report climate-related risks in line with the TCFD's recommendations. In December 2020, the Global Financial Markets Association called for mandatory climate-related disclosures in section 4.2.1 of its report, Climate Finance Markets and the Real Economy.

In September 2020, New Zealand became the first country in the world to require the financial sector to report on climate risks. Once the legislation passes, the requirement will apply to publicly listed companies and large insurers, banks and investment managers. By introducing a mandatory climate-related financial disclosure regime, New Zealand is moving ahead of other countries that are working towards some form of climate risk reporting for companies, a list which includes Canada, Australia, U.K., and the European Union.

In the drive to reduce emissions, the metals and mining sector has a key role to play. Sustainability initiatives around electrification, water stewardship and tailings management, as well as the circular economy, are just a few examples of the innovative and solution-based approaches that will help facilitate the sector's transition to a low-carbon economy.

Case Law Summaries

Environmental Law

Kathryn Gullason, Alexis Hudon and Caroline-Ariane Bernier

Ressources Strateco inc. c. Procureure générale du Québec, 2020 QCCA 18

In this decision, the Québec Court of Appeal upheld a decision of the Minister of Sustainable Development, the Environment, Wildlife and Parks (Minister) refusing a certificate of authorization for uranium exploration.

Strateco Resources Inc. (Strateco), a mining exploration company, acquired mining claims in the Otish Mountains in Northern Québec, a region known for its uranium potential. Strateco sought to carry out an advanced uranium exploration project (Project), and took steps to obtain the necessary regulatory approvals, including obtaining a certificate of authorization (Certificate) from the Minister under s. 164 of the Québec *Environmental Quality Act* (EQA). When determining whether to issue a Certificate, the Minister must consider the principles set out in s. 152 of the EQA, including "the participation of the Crees in the application of the environmental and social protection regime."

In 2013, the Minister announced a moratorium on uranium exploration in Québec (Moratorium). The Minister also refused to issue the Certificate to Strateco on the basis of a lack of social acceptability from the local Cree community. Strateco filed an application

against the Attorney General of Québec seeking approximately C$200 million in damages. Strateco argued that the Minister was not entitled to refuse to issue the Certificate on the basis of social acceptability, and that the actions of the Minister amounted to an expropriation of Strateco's mining claims.

The Québec Superior Court dismissed Strateco's application, finding that although social acceptability is not expressly set out as one of the principles under s. 152 of the EQA, it is encompassed by those principles. Further, the Court found that the Minister had not acted in bad faith by refusing to issue the Certificate, and that there had been no expropriation since Strateco still held its mining claims.[43] Strateco appealed.

The Québec Court of Appeal first reviewed the doctrine of qualified immunity, which shields the state from civil liability resulting from policy decisions. Policy decisions are discretionary decisions that involve social, political and economic factors, as opposed to operational decisions, which merely apply an established policy. The Court concluded that the Minister's decision did not fall clearly within the category of a "core policy" decision; however, it was closer to a policy decision than to an operational decision. Therefore, the Minister's decision was protected by the doctrine of qualified immunity and Strateco was required to show that the Minister acted in bad faith or with serious carelessness or recklessness.

The Court of Appeal concluded that under the EQA, the Minister was entitled to refuse the Certificate based on a lack of social acceptability, and that no presumption of bad faith arose because the Minister placed decisive weight on this factor. Citing the lower court's judgment, the Court of Appeal noted that the Minister did not make his decision lightly or in a manner indicative of bad faith or serious recklessness. The Court of Appeal also held that the Minister's decision and the Moratorium did not amount to expropriation, since the state had not withdrawn or claimed anything from Strateco. Finally, the Court of Appeal found that the duty of coherence, previously only recognized in the context of contractual liability, did not apply in the circumstances.

Strateco's application to appeal the Québec Court of Appeal's decision to the Supreme Court of Canada was dismissed with costs.[44]

Taseko Mines Limited v. Canada, 2019 FCA 319 and 2019 FCA 320

In these decisions, the Federal Court of Appeal affirmed the Federal Court's dismissal of two judicial review proceedings commenced by Taseko Mines Limited (Taseko), after a federal environmental assessment concluded that Taseko's proposed New Prosperity Gold-Copper Mine project (Project) would result in significant adverse environmental effects that were not justified in the circumstances.

The Project is a C$1.5 billion open pit gold and copper mine located approximately 125 km southwest of Williams Lake, British Columbia. In 2010, the Project's predecessor, the Prosperity Mine, was rejected following a federal environmental assessment. In 2011, Taseko submitted the revised Project for review. The Minister of Environment (Minister) ultimately determined that the Project was likely to cause significant adverse environmental effects (with reference to a Federal Review Panel's Final Report), and the governor-in-council (GIC) decided that the significant adverse environmental effects were not justified in the circumstances. Taseko commenced two judicial review proceedings: one regarding the Final Report itself, and the second regarding the decisions by the Minister and the GIC.

In the first appeal (2019 FCA 319), Taseko argued that the Panel's conclusions in the Final Report were unreasonable, that the Panel relied on certain evidence without giving Taseko the opportunity to respond to it, and that the Panel breached its duty of procedural fairness. The Court of Appeal concluded that the Final Report was not amenable to judicial review, as it did not affect any of Taseko's legal rights and carried no legal consequences. Despite this being sufficient to dispose of the appeal, the Court of Appeal also concluded that the Panel's reasoning met the required standard of

[43] The Québec Superior Court's decision, *Ressources Strateco inc. c. Procureure générale du Québec*, 2017 QCCS 2679, is discussed in *Mining in the Courts*, Vol. VIII.

[44] *Strateco Resources Inc. v. Attorney General of Quebec*, 2020 CanLII 76222 (SCC).

"justification, transparency and intelligibility" and fell within the range of reasonable outcomes. There was no breach of procedural fairness because Taseko knew the case it had to meet, and had sufficient notice and reasonable time to respond.

In the second appeal (2019 FCA 320), Taseko argued that the decisions by the Minister and the GIC should be quashed due to breaches of procedural fairness and jurisdictional errors. Taseko also challenged the constitutionality of ss. 5(1)(c) and 6 of the Canadian *Environmental Assessment Act*, *2012* (CEAA 2012), arguing that they impaired the provincial head of power under s. 92A of the *Constitution Act*, *1867* to develop and manage non-renewable natural resources. The Court of Appeal found that the Federal Court did not err in finding that Taseko was only owed a "minimal" degree of procedural fairness at the Ministerial decision-making level, and that there was no breach of procedural fairness in the circumstances. It is during the Panel review process that the parties are owed a high degree of procedural fairness, not at the Ministerial decision-making level. The Court of Appeal also affirmed the Federal Court's finding that the Minister and the GIC had jurisdiction to make their decision. Finally, the Court of Appeal found that Taseko had not offered any argument or shown any error committed by the Federal Court in exercising its discretionary power to dismiss Taseko's constitutional challenge. Thus, the Court of Appeal determined that the constitutional issue was not reviewable.

Taseko's application for leave to appeal both the Federal Court of Appeal's decisions to the Supreme Court of Canada was dismissed with costs.[45]

[45] See *Taseko Mines Limited v. Minister of Environment*, 2020 CanLII 33845 (SCC).

Case Law Summaries

Injunctions

Lindsay Burgess and Kathryn Gullason

Copper North Mining Corp. v. Granite Creek Copper Ltd., 2019 BCSC 2272

In this decision, the British Columbia Supreme Court refused to grant an interlocutory injunction enjoining Granite Creek Copper Ltd. (Granite Creek) from, among other things, completing a transaction for the acquisition of shares in Copper North Mining Corp. (Copper North).

Copper North and Granite Creek, companies with mining interests adjacent to each other in the Yukon, were discussing a potential merger. In the course of the negotiations, the parties began exchanging financial and other information, and entered into a non-disclosure agreement (NDA) containing a standstill provision. The negotiations later broke down, and Granite Creek issued a press release announcing that it had entered into an agreement to acquire approximately 30% of Copper North's outstanding common shares. Copper North filed a notice of civil claim alleging that Granite Creek breached the standstill provision of the NDA, and obtained an interim injunction prohibiting Granite Creek from completing the share acquisition. Copper North then applied for an interlocutory injunction and Granite Creek cross-applied to have the injunction set aside.

Following the test in *RJR-MacDonald*, the Court dismissed Copper North's application because it had not established that it would suffer irreparable harm or that the balance of convenience favoured granting the injunction. With respect to the latter, the Court noted that granting the injunction would prevent Granite Creek from obtaining shares and voting them in an upcoming meeting. Furthermore, Copper North was on the brink of insolvency and therefore was likely not in a position to satisfy an order respecting damages resulting from the injunction. As such, the balance of convenience favoured Granite Creek, not Copper North. In the result, Copper North's application was dismissed and Granite Creek's was allowed.

Highlands District Community Association v. British Columbia (Attorney General), 2020 BCSC 1386

In this decision, the British Columbia Supreme Court declined to issue an interim injunction because the respondent holder of a quarry permit would suffer irreparable harm, including financial harm to itself and harm to third-party contractors and employees.

The petitioner, Highlands District Community Association (Highlands) brought an application for an interim injunction pending judicial review of a quarry permit issued to O.K. Industries Ltd. (OKI). Highlands brought the petition for judicial review on two grounds: (i) Highlands was denied procedural fairness in the Chief Inspector of Mines' (CIM) consideration of OKI's permit application; and (ii) the CIM's decision to grant the permit was unreasonable.

OKI argued that it would suffer irreparable harm if the injunction were granted. OKI intended to commence quarrying operations in 2021; however, in order to do so, OKI had to clear and prepare the site and build an access road beforehand. If OKI was prevented from doing so by the injunction it would be unable to start quarrying until the spring of 2022. The delay would have negative financial impacts on OKI, including loss of revenue and the requirement to perform another environmental survey. OKI would also risk losing its preferred tradespersons and contractors, and the employees slated to work on the quarry would lose their jobs.

Highlands argued that the quarrying operations would be disruptive to nearby residents, would create enormous amounts of dust, blasting and loud noise throughout the day, would increase vehicle traffic and cause environmental degradation, including potential contamination of the local aquifer. Highlands also pointed to the potential for property values to decrease.

The Court held that the balance of convenience did not favour granting the interim injunction and dismissed Highlands' application.

The Court found that Highlands failed to demonstrate that it would suffer irreparable damages, given that actual quarry mining was not scheduled to start until 2021, at which point, absent exceptional circumstances, the judicial review decision would be made. On the other hand, the Court found that OKI would suffer significant financial loss if the interim injunction were granted, particularly in view of the fact that Highlands had not provided an undertaking as to damages. Finally, the Court found that the quarry permit conditions, as well as the laws and regulations applicable to OKI's quarry operations, would serve to effectively "reflect and manage" the competing public interests in the circumstances.

The British Columbia Supreme Court later dismissed Highlands' application for judicial review, finding that the decision to issue the quarry permit was reasonable and the process leading to the decision was procedurally fair.[46]

[46] See *Highlands District Community Association v. British Columbia (Attorney General)*, 2020 BCSC 2135.

Labour and Employment

Ben Ratelband, Justine Lindner, Caroline-Ariane Bernier, Marco Fimiani, Kathryn Gullason and Lauren Soubolsky

International Union of Operating Engineers, Local 955 v. Aecon Mining (Division of Aecon Construction Group Inc.), 2020 CanLII 24201 (AB GAA)

In this arbitration, the arbitrator affirmed that where a collective agreement is silent regarding the termination of probationary employees, just cause is required for termination. However, the standard to in respect of probationary employees is lower than that applicable to seniority-rated employees.

The employee (Grievor) was employed by Aecon Mining (Employer) to drive large trucks at an open pit mine site. The Grievor was dismissed after just over two weeks of work for refusing to follow the instructions of spotters while operating the vehicles. The Grievor was a probationary employee under the collective agreement. The collective agreement is silent regarding the termination of a probationary employee, but provides that employees may only be terminated by the Employer for just cause.

The International Union of Operating Engineers, Local 955 (Union) commenced a grievance on behalf of the Grievor, alleging that he had been dismissed by the Employer without cause. The Union argued that the Grievor should have been subject to progressive discipline, not termination. The Employer, on the other hand, argued that it did have just cause to terminate the Grievor because the Grievor engaged in inappropriate conduct and performance in a safety-sensitive environment.

Ultimately, the arbitrator determined that probationary employees are subject to the just cause provisions under the collective agreement. However, the arbitrator found that the just cause standard for probationary employees is lower than the standard applied to seniority-rated employees. Citing the decision of Arbitrator Pitcher in *Scarborough (Borough) Board of Education v. O.S.S.T.F., District 16* (1980), 26 L.A.C. (2d) 160 (Ont. Arb), the arbitrator noted that arbitrators have continued to show substantial deference to the judgment of the employer in decisions to terminate probationary employees. The just cause standard for probationary employees that has developed in arbitral jurisprudence is the standard of "suitability."

In upholding the termination of the Grievor, the arbitrator held that the Grievor intentionally defied directions, was insubordinate and breached safety rules in a safety-sensitive environment. He defied his spotters and knowingly ignored safety protocols. In doing so, the arbitrator held that he acted dangerously and found that the Employer had good reason and just cause to find the Grievor unsuitable for the position.

Mudjatik Thyssen Mining Joint Venture v. Billette, 2020 FC 255

In this decision, the Federal Court upheld an adjudicator's decision that the dismissal of two mine employees for refusing to take a drug test was unjust.

This case involves the dismissal of two employees of Mudjatik Thyssen Mining (MTM) working at the McArthur River Mine, which is owned and operated by Cameco Corporation (Cameco). After being informed that the employees were smoking drugs on the job, MTM searched the employees' rooms and work lockers and demanded that they take a drug test. Both employees denied taking drugs before or during their shift and refused the drug test because they felt that MTM did not have reasonable cause for testing. Following their dismissal, the employees filed a complaint of unjust dismissal under the *Canada Labour Code*.

The adjudicator found that the employees were unjustly dismissed by MTM because MTM failed to establish reasonable suspicion to justify its demand for a drug test. Specifically, the adjudicator noted that both case law and the MTM and Cameco policies required that testing be based on direct observation of the employees' conduct on the job. The adjudicator found that the employees were entitled to any income they would have earned from the date of their dismissal to the date of the closure of the mine, less any income earned from other sources. Additionally, the adjudicator ordered that both employees be reinstated to their positions, and that any layoff and other privileges they would have had also be reinstated. MTM was also ordered to have the employees' Cameco camp privileges restored.

MTM filed an application for judicial review of the adjudicator's decision with the Federal Court. MTM claimed it had just cause to dismiss the employees because of the safety-sensitive nature of its operations in underground mining, and asked that the adjudicator's ruling be set aside and deemed unreasonable. Additionally, MTM argued for a flexible and "common sense" reading of its Substance Abuse Policy (Policy). The Federal Court dismissed the application for judicial review in relation to the unjust dismissal and lost wage issue. Considering the wording and overall context of the Policy, the Federal Court was not persuaded that the adjudicator's decision in connection with the Policy was unreasonable. The Federal Court noted that the adjudicator could not be faulted for applying the specific wording of the Policy to the facts of the case. The Federal Court did, however, grant the application for judicial review in relation to the order that the employees have their Cameco camp privileges restored.

Thompson Creek Metals Inc. and USW, Local 1-2017, Re, 2020 BCLRB 22

In this decision, the British Columbia Labour Relations Board (Board) confirmed that the test for granting a union access to an employer's work site depends on whether the union has the same access to employees who reside on the work site as those that reside off-site.

In early 2020, USW, Local 1-2017 (Union) applied to the Board for an access order under ss. 7(2) and 7(3) of the *Labour Relations Code* (Code) seeking access to the employees at the Mount Milligan Mine (Mine) in Northern British Columbia. Section 7(2) of the Code provides that the employer must, on the Board's direction, provide access to a union attempting to persuade the employees to join a trade union. Section 7(3) provides that if an access order is granted, the employer must also provide the union's representative(s) with food and lodging while on site.

The Mine is owned by Thompson Creek Metals Inc. (Employer). It is located in a remote site, approximately 145 kilometers from Prince George, British Columbia, between the smaller communities of Fort St. James and Mackenzie. There are approximately 559 employees working at the Mine, and the Mine provides a full service, live-in camp for about 420 of them. Employees at the Mine work on a seven days on, seven days off schedule. Many employees stay in camp during their shift, but some live in the neighbouring communities and take the bus or drive to and from the work site between shifts.

The Employer argued that the Union had not shown any proof of organizing efforts, such that the Board should not grant the Union an access order. The Board agreed that unions should not be granted access orders as a matter of right, but argued that the test for an access order does not require proof of organizing. The union only needs to show it does not have the same access to resident employees as non-resident employees.

In this case, the Board found that the Union did not have the same access to employees who resided in camp during their shift as it did to non-resident employees. The Board noted that even though the camp had wi-fi and cell phone service, there was no substitute for face-to-face contact, which is the most effective method of organizing. Accordingly, the Board granted access to two Union representatives for two five-day periods for the purpose of organizing.

It is notable that the Board's decision was made on February 24, 2020, shortly before government restrictions on gatherings were issued due to the COVID-19 pandemic. While the underlying test for an access order is unlikely to change in the wake of COVID-19, it is possible that the Board may consider different factors in light of face-to-face contact no longer being the safest method of organizing.

Article

Workforce Health and Safety Considerations for the Mining Industry in the Wake of COVID-19

Ben Ratelband, Justine Lindner, Caroline-Ariane Bernier, Marco Fimiani and Sarah Tella

The COVID-19 pandemic has impacted mining companies of all sizes all over the globe. As circumstances relating to the pandemic continue to evolve and change rapidly, the legitimate objectives and legal obligations of Canadian employers to provide for a safe workplace have not changed. Put simply, the pandemic has enhanced the measures that employers must implement to fulfill their obligations under applicable occupational health and safety legislation.

In March 2020, at the outset of the pandemic, many businesses were ordered to shut down by provincial governments and only businesses providing "essential services" to the public were permitted to operate. While the timing of these orders varied from jurisdiction to jurisdiction, in many provinces, mining operations were either deemed essential services or authorized to continue limited activities necessary to the eventual full resumption of their operations. As a result, employers in the mining industry were some of the first to adapt to the new realities and challenges brought forth by the pandemic and to implement creative solutions to address the increased risks to health and safety of workers. Working remotely was not and is still not available to all workers involved with the successful operation of a mine. This, along with other factors specific to the mining industry, such as remote locations, has required mining companies to consider and implement a myriad of health and safety measures unique to the industry in an effort to balance their obligations under applicable occupational health and safety legislation and in an effort to maintain business continuity. This article discusses these challenges and considerations that are unique to the mining industry.

Screening and Physical Distancing

The mining industry faces its own set of distinctive challenges when it comes to physical distancing. Workplaces are often underground with unique spatial dimensions and features that do not lend themselves to physical distancing. The ways in which individuals are able to access the mines (i.e. elevator cages and other modes of transportation), may not allow for individuals to comply with physical distancing requirements. For example, fly-in fly-out (FIFO) operations may result in workers having to be in close proximity on air transportation during travel to and from the mining sites.

The foregoing complexities have resulted in a unique set of physical distancing challenges for mining industry employers. Measures used in the industry to address these challenges include staggered start times, staggered shifts and break times, restrictions on the number of people on-site, and restrictions on the locations they are assigned to work.

Not all areas of a mine allow for physical distancing. Recognizing this while being cognizant of the legitimate objective and legal obligation as employers to provide for a safe workplace, many employers in the mining industry have found innovative ways to screen employees and/or take additional precautions where physical distancing cannot be maintained. For example, many have been screening workers before they enter the mining site with additional screening done before shifts. Depending on the specific circumstances, this may include a screening questionnaire and/or temperature screening of workers. Other measures may include an on-site COVID-19 testing laboratory to test all workers when they arrive and leave the mining site, and during the middle of their rotation on the site, as well as the implementation of virtual health care applications that allow the remote screening of workers. Additionally, some employers have adjusted the capacity limits for elevator cages to coincide with physical distancing requirements. Others have implemented policies requiring employees to utilize respirators when in elevator cages.

Work Camps

Work camps service workplaces located in remote areas that do not have direct access to necessary resources or medical facilities. Workers traveling to these sites often come from different regions that are subject to different COVID-19 restrictions, or are impacted at different levels by the pandemic, and they are cohabitating during their scheduled work period at the site.

While work camps already came with their own set of unique considerations, these considerations have been amplified by COVID-19. This is because workers are not only working alongside one another but are also living in close proximity to one another. Therefore, in addition to adhering to relevant guidance in connection with, among other things, sanitation and physical distancing, mining industry employers should also consider ensuring that work camps are stocked with infection control supplies on site. Other considerations may include the preparation of evacuation plans for when workers must be sent home or to the hospital due to suspected cases of COVID-19, as well as work camp isolation protocols for sustaining long-term, on-site isolation. Further, mining industry employers may also want to consider designating an isolation place within the work camp in the event it is necessary to minimize the contact that an infected or potentially infected individual has with others on the mining site.

Many mining industry employers have already established protocols and procedures to control the interaction of workers at work camps. For example, some have organized a sterilized and separate section of the site residence facility located at the work camp. The allocated areas of the work camp are designed to ensure that workers who have COVID-19 are able to properly isolate from others. Some employers have also implemented flexible scheduling by implementing a set day off and on schedule thereby reducing the amount of time that workers will be exposed to one another within the work camp. Others have extended the duration of shift rotations to lessen the changeover of workers and reduce exposure.

FIFO Operations and Isolation Requirements

FIFO operations are a common reality for many employers in the mining industry. As mines are often located in remote locations, workers do not always live near the mine and must instead travel into their workplace. Employees often fly in on small chartered planes, which can make physical distancing efforts difficult. From a health and safety perspective, there is potential for FIFO workers to be considered to be "in the course of employment" when traveling to and from their remote workplace. As such, mining industry employers operating FIFO operations need to be cognizant of health and safety considerations including physical distancing on travel to and from the mining site.

The mining industry has also had to consider the implications of provincial self-isolation requirements for workers who are flying or traveling in from other provinces to work at the mine. Provincial requirements regarding self-isolation differ within Canada and are subject to change as the COVID-19 pandemic evolves. Some employers have allowed the employees flying in from other provinces to self-quarantine directly at their respective mining sites. In some cases, employees who work in solitary positions are being permitted to work while they are quarantining.

The COVID-19 pandemic has highlighted the challenges faced by FIFO operations and mobile workforces and employers have adapted to address these challenges. In some cases, employers have opted to place employees and contractors with enhanced vulnerabilities to COVID-19 on paid leave and/or have sent local Indigenous workers from remote communities home with pay to avoid a potential spread of COVID-19 to more vulnerable communities. In some cases, mining operations were slowed down for a care and maintenance period during the early days of the COVID-19 pandemic with the mine gradually working towards safely resuming operations.

Conclusion

The mining industry is no stranger to health and safety challenges, nor is it a stranger to resilience and adaptability. As the COVID-19 pandemic continues to evolve, the mining industry must continue its efforts to safeguard health and safety while maintaining operations as best possible.

Securities and Shareholder Disputes

Kathryn Gullason, Alexis Hudon and Caroline-Ariane Bernier

2538520 Ontario Ltd. v. Eastern Platinum Limited, 2020 BCCA 313

In this decision, the British Columbia Court of Appeal denied leave to a shareholder seeking to bring a derivative action against a company's directors because the applicant had an ulterior personal motive and was not acting in good faith.

2538520 Ontario Ltd. (253), a shareholder of Eastern Platinum Limited (EPL), sought leave to commence a derivative action on behalf of EPL against a number of its current and former directors. 253 alleged that the directors breached fiduciary duties and were negligent in relation to EPL's operations by, in particular, authorizing EPL to enter into a series of improvident transactions concerning the recovery and sale of chrome from stored tailings at the Crocodile River Mine in South Africa. 253 further alleged that the directors had not conducted the requisite due diligence regarding the project's feasibility and that they had failed to explore other options available to EPL. 253's CEO, Mr. Hong, had previously been involved in an unsuccessful take-over bid of EPL, which he initially failed to disclose to the court.

A complainant seeking to bring a derivative action under s. 233(1) of the British Columbia *Business Corporations Act* (BCBCA) must establish a number of criteria, including that the complainant is acting in good faith, i.e., for the primary purpose of pursuing the derivative claim on the company's behalf. In reviewing this element, the court will consider the applicant's belief in the merits of the proposed action, existing disputes between the parties, and alleged ulterior motives. Here, the application judge dismissed 253's leave application, finding that 253 had failed to meet its onus to show, on a balance of probabilities, that it was acting in good faith.

On appeal, the British Columbia Court of Appeal considered whether the application judge erred in finding that 253 had not satisfied the test for leave. A majority of the Court of Appeal found that the application judge had not erred on any of the grounds alleged by 253, and dismissed the appeal. In particular, the majority held that the application judge was correct in finding that the applicant for a derivative action bears the onus of establishing, on a balance of probabilities, that the action is brought in good faith. Although the application judge described the onus as "substantial," the majority held this was not an error of law, as the correct standard was ultimately applied. While the CEO of 253's stated belief in the merits of the claim was some evidence of good faith, this was not determinative. The majority also found that the application judge's conclusion that the CEO was personally motivated, as opposed to acting with a primary purpose of benefitting EPL, was a reasonable inference based on the evidence before him.

Baldwin v. Imperial Metals Corporation et al, 2020 ONSC 5616

In this decision, the Ontario Superior Court of Justice confirmed that a shareholder will only be granted leave to commence a secondary market misrepresentation action against an issuer under s. 138.3(1) of the Ontario *Securities Act* if there is some evidence that the issuer publicly corrected an alleged misrepresentation.

On August 4, 2014, part of the perimeter wall of the tailings storage facility at the Mount Polley Mine (Mine) in British Columbia collapsed and led to a breach, creating one of the worst environmental disasters in Canadian history. That same day, Imperial Metals Corporation (Imperial), the owner of the Mine, issued a press release stating that the cause of the breach was unknown to them at the time. Following the breach, Imperial's share value decreased by 40% and it lost C$500 million in market capitalization. An Imperial shareholder, Claire Baldwin (Baldwin) brought a motion under s. 138.8 of the *Securities Act* for leave to start a secondary market misrepresentation claim against Imperial on the basis of s. 138.3(1). Under s. 138.3(1), a shareholder has a right of action for damages (subject to obtaining leave under s. 138.8) if the shareholder acquired or disposed of shares during a period of time when an issuer released a document containing a misrepresentation, and then publicly corrected such misrepresentation, regardless of whether the shareholder relied on the misrepresentation.

The alleged misrepresentations in this case were that Imperial was aware of potential risks and deficiencies in the tailings storage facility that should have been disclosed in public statements about the design, construction and operation of the Mine. Imperial denied that it had made any such misrepresentations.

The Court dismissed the leave motion because Imperial's alleged misrepresentations had never been publicly corrected. The Court held that there is no basis for a secondary market misrepresentation action under s. 138.3(1) absent a discrete and identifiable public correction, either by the company or by a third party. A public correction must be reasonably capable of revealing to the market the existence of an untrue statement of material fact or omission of a material fact.

Baldwin argued that Imperial had partially corrected the alleged misrepresentations in an August 4, 2014 press release. In rejecting this argument, the Court noted that a correction cannot be partial. Furthermore, the press release did not say anything other than that the tailing storage facility had been breached, that the cause of the breach was unknown, and that Imperial was assessing the extent of the damage. Thus, there was nothing in the press release that indicated that the breach could have been caused by any of the risk factors Imperial was allegedly aware of and had omitted to tell its shareholders.

Bamrah v. Waterton Precious Metals Bid Corp., 2020 BCCA 122

In this decision, the British Columbia Court of Appeal upheld the Supreme Court's determination of the fair value of shares under s. 245(2)(a) of the British Columbia *Business Corporations Act* (BCBCA).

In February 2014, Waterton Precious Metals Bid Corp. (Waterton) made a hostile bid to take over Chapparal Gold Corp. (Chapparal) for C$0.50 per share. Chapparal is a British Columbia company engaged in mining activities in Nevada. The hostile take-over bid was rejected by Chapparal's Board of Directors (Board). In July 2014, Waterton made another offer at C$0.55 per share, which the Board again rejected. However, one month later, an independent special committee appointed by the Board began negotiations with Waterton. The negotiations eventually led to an offer from Waterton to pay C$0.61 per share (Arrangement). Chapparal received an independent opinion that the fair market value of the shares was between C$0.45 and C$0.76 per share and that Waterton's offer would therefore be fair to Chapparal's shareholders. Based on this valuation, and the fact that the offer came from a comprehensive

negotiation process, the special committee recommended that the Board approve the Arrangement, which it did in October 2014. The Arrangement was then approved by the court.

In September 2015, a dissenting shareholder (Bamrah) commenced a petition to determine the fair value of the shares under s. 245(2)(a) of BCBCA. The chambers judge determined that the onus is on the court, not the parties, to arrive at a fair value by considering all relevant evidence. In this case that included the value attributed to the shares by the Arrangement, the history of the transacting companies, the trading price of the shares, the context of the Arrangement and negotiated price per share, and the expert opinions. Ultimately, the chambers judge concluded that C$0.61 was within the range of fair market value for the shares and was arrived at by sophisticated, arm's length parties negotiating in an open market.

Bamrah appealed. The Court of Appeal dismissed the appeal, finding that the chambers judge had considered the correct legal principles and framework in setting the fair market value. In so finding, the Court of Appeal rejected Bamrah's assertion that the chambers judge started his analysis with a presumption that the deal price was fair. Instead, the Court of Appeal found that the chambers judge properly used the deal price as a starting point, while also considering other relevant market-based factors to determine fair value. The Court of Appeal held that in a functioning open market, "the transaction price is more probative of value than a theoretically derived value." The Court of Appeal also rejected Bamrah's argument that the chambers judge made palpable and overriding errors in its findings of fact. The Court held that the chambers judge was entitled to prefer Waterton's expert evidence over Bamrah's, and had a strong evidentiary foundation to make the factual findings that he did.

Bamrah's application for leave to appeal to the Supreme Court of Canada was dismissed.[47]

Nseir c. Barrick Gold Corporation, 2020 QCCS 1697

In this decision, the Québec Superior Court dismissed a shareholder's application for authorization to pursue an action for damages under the Québec *Securities Act* and for authorization to institute a class action.

The plaintiff shareholder alleged that Barrick Gold Corporation (Barrick) and certain of its officers failed to comply with their continuous disclosure obligations in relation to its Pascua-Lama project (Project), an open pit mine site straddling the border between Chile and Argentina. Specifically, the plaintiff alleged that Barrick made material misrepresentations regarding its compliance with certain environmental conditions relating to the Project's water management system, glacier monitoring and protection program, and dust mitigation plan. In April 2013, a Chilean court suspended the Project due to environmental non-compliance. Barrick maintained that it had disclosed all relevant risks regarding environmental compliance to the market.

[47] See *Nandeep Bamrah v. Waterton Precious Metals Bid Corp.*, 2020 CarswellBC 2348 (SCC).

The Court dismissed the application to bring an action for damages under the *Securities Act*, holding that the plaintiff's argument was made with the benefit of hindsight. The fact that the Project was suspended did not, without more, lead to the conclusion that Barrick knew it was non-compliant all along and therefore deliberately misled the market. The Court further noted that Barrick cautioned investors about the risks and uncertainties surrounding the Project's environmental compliance, and a reasonable investor would have taken this into account in making investment decisions. Moreover, the Court found no evidence supporting the significance of the alleged misrepresentations or the link between the decision of the Chilean court and the decline in share price.

The Court also dismissed the application to institute a class action, finding that the plaintiff had not made out a defendable case. The Court found that the plaintiff had failed to establish that Barrick made any material misrepresentations, had not pleaded that he had relied on any misrepresentation by Barrick, and made no connection between the value of Barrick's share prices and the alleged misrepresentations.

The plaintiff has filed an appeal of the Québec Superior Court's decision.

Titan Minerals Limited and Core Gold Inc., Re, 2020 BCSECCOM 50

In this decision, the British Columbia Securities Commission (Commission) confirmed that a shareholder alleging non-disclosure or inadequate disclosure by an issuer in the context of a take-over bid must establish material non-disclosure or materially inadequate disclosure.

Core Gold Inc. (Core Gold) was the subject of an unsolicited take-over bid by Titan Minerals Limited (Titan). Interested shareholders of Core Gold (Shareholders) brought an application requesting that the Commission order Titan to both: (i) issue an amended bid circular making additional disclosure; and (ii) hold its bid deadline open for an additional 60 days to allow shareholders time to react to the additional disclosure.

The Shareholders argued that Titan's disclosure under National Instrument 62-104, *Take-Over Bids and Issuer Bids*, was deficient and misleading. In particular, the Shareholders alleged that Titan had knowingly failed to disclose that the operating permits for its Vista Gold Plant—a subsidiary of Titan and its only revenue earning property—were in jeopardy as a result of a notice it had received from the regional authority in Peru, where the plant operated. They also argued that there was inconsistent disclosure with respect to Titan's Torrecillas project.

Finally, they argued that Titan had failed to disclose that it had insufficient finances to satisfy its dissent obligations and that its bid premium was misleading.

The Commission dismissed the application for additional disclosure, rendering moot the application for extended time. The Commission summarized the applicable law, finding that inadequate disclosure must meet the standard of materiality. An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote or, in this case, in deciding whether to tender their shares in the case of a take-over bid. Here, the Shareholders had failed to establish on a balance of probabilities that any risk to Vista Gold Plant's operating permit rose to the level of a material fact. The allegations about the Torrecillas Project, as well as Titan's financial condition, were either speculative or insufficiently substantiated by the Shareholders. Finally, the Commission rejected the argument that the premium was misleading, finding that Titan had calculated the premium in accordance with standard and acceptable practice.

Article

Recent Developments in Intellectual Property Litigation in the Mining Sphere

Timothy St. J. Ellam, Steven Tanner, James S.S. Holtom, Tracey Doyle and Kendra Levasseur

Looking back, 2020 was an active year for mining-related intellectual property cases in the Federal Courts. First, the Federal Court of Appeal (FCA) issued seminal decisions on the remedies available to companies pursuing alleged patent infringers. Second, the Federal Court (FC) signalled a new shift towards summary judgments in patent litigation, which can lead to quicker recovery for companies whose IP rights have been blatantly infringed. Third, both courts considered how to best balance protecting the rights of the parties while those parties wait for their cases to go to trial or appeal. These decisions have provided new tools and updated existing tools to allow IP rights holders to pursue infringers quickly and to be compensated for their losses.

Recovering Losses

There are two primary ways to collect money for patent infringement: (i) compensatory damages meant to make the patent owner whole and put it in the position it would occupy had its patent not been infringed; or (ii) an accounting of the infringer's ill-gotten profits from their infringing acts. Plaintiffs are entitled to elect between either method, though the default remedy is damages. The Court retains the ultimate discretion to disallow an accounting of profits — an equitable remedy — where that award would be inequitable. Two cases decided by the FCA this year set out the principles to keep in mind when calculating the amount recoverable using each method of calculation.

Compensatory Damages

Compensatory damages are based on the losses suffered by the patent holder and aim "to restore those whose patents have been infringed to the position they would have been in had the infringement never taken place." [48] The amount can be calculated based on lost sales or, if the patent owner does not make sales itself, based on the royalty the infringer would have paid to license the patent rather than infringe it.

In *Dnow Canada ULC v. Grenke Estate*,[49] the FCA affirmed the FC's decision that Mr. Grenke was owed C$8,207,000 in damages for the infringement of his patent on an improved seal assembly for restraining oil leakage from oil well pumps. In doing so, the FCA affirmed that in order to claim damages for lost sales, the patentee "must establish they would have had the sales but for the infringement."[50] Relevant evidence includes whether the infringing product is "a direct substitute" for the patented product, whether the products are marketed in the same geographic market, and whether there is evidence of specific lost sales. Historical market share can also be used as a proxy for determining lost sales but, in order to rely on this factor, the Court must first assess whether it is a reliable basis for assessing the hypothetical "but for" market.[51]

Accounting of Profits

An accounting of profits is an equitable remedy that allows the patent holder to recover the profits that the infringer improperly made by infringing the patent. The calculation is based on the profits the infringer made instead of the losses the patent holder incurred and can result in a much larger amount than those recovered by compensatory damages.

In *Nova Chemicals Corporation v. Dow Chemicals Company*,[52] the FCA, for the first time, explicitly and comprehensively set out the "principles that underlie … an accounting of profits as a remedy for patent infringement."[53] While this decision was made in the context of a dispute between chemical companies, these principles will apply across industries. In summary:

- An accounting of profits will "remove the benefits the wrongdoer has made as a result of the infringement" so "[p]otential infringers realize that they will not come out ahead if they infringe a patent and the infringement is detected."[54]
- An accounting of profits is not punitive. However, the Court must follow the settled doctrine and not be "spooked" by the quantum of recovery.[55]
- The patentee can only recover actual, real-world profits — meaning the actual revenues minus actual costs — not profits which could have, would have or should have been made (e.g., by factoring in opportunity costs).[56]

[48] *Nova Chemicals Corporation v. Dow Chemicals Company*, 2020 FCA 141 at para. 15.
[49] 2020 FCA 61 [*Dnow*].
[50] *Dnow* at para. 25.
[51] *Dnow* at para. 77.
[52] 2020 FCA 141 [*Nova*].
[53] *Nova* at para. 10
[54] *Nova* at para. 20.
[55] *Nova* at para. 30.
[56] *Nova* at para. 37.

- The patentee can only recover the profits that resulted from the patent infringement. To make this determination, the Court must use value-based apportionment, i.e., the court must identify the value/profit generated by the infringer that are causally attributable to the patented invention.[57]
- "[P]atentees must take their infringers as they find them." The use of hypotheticals and the "but for" test is impermissible.[58]
- The infringing product should be compared to the baseline non-infringing alternative to effectively isolate the value of the patent.[59]

These principles will inform all future FC decisions on this issue.

Reaching Decisions More Quickly

Two types of summary decision-making processes were also used in the mining context this year: (i) asking the Court to determine a specific, distinct question of law before going to a full trial; and (ii) default judgment. Each is discussed in turn.

In *Mud Engineering Inc. v. Secure Energy Services Inc.*,[60] Mud Engineering Inc. (Mud Engineering) asked the Court to determine a specific question of law before proceeding to a full trial. The question was whether the Court had the jurisdiction to decide ownership of the disputed patents relating to drilling fluid composition used in extracting bitumen from wells in Western Canada.

Mud Engineering started actions in the Alberta Court of Queen's Bench (ABQB) and in the FC making the same allegations. In the ABQB, Justice Ashcroft rejected Mud Engineering's application to stay the Alberta proceedings pending a decision by the FC. Instead, she invited the parties to obtain a preliminary determination from the FC as to whether it would assume jurisdiction over the issue of the patents' ownership. If the FC agreed, the Alberta Justice was prepared to reconsider the stay application.[61]

The FC answered the question of law in the affirmative: the FC does have jurisdiction to adjudicate patent title claims.[62] The Federal Court answered this question as a preliminary determination of a question of law[63] (as opposed to a declaration[64]) so that its decision would "not be construed as case specific."[65]

Bringing this type of motion is an option to consider if there is an independent, purely legal question that may resolve the dispute. In such cases, a summary determination on a point of law can provide a cost- and time-saving mechanism.

In *NuWave Industries Inc. v. Trennen Industries Ltd.*,[66] the Federal Court considered a second type of abbreviated proceeding: default judgment.[67] After successfully bringing a motion to strike Trennen Industries Ltd.'s (Trennen) defence and counterclaim, NuWave Industries Inc. (NuWave) requested default judgment that Trennen had infringed its patent related to a device used to cut wellbores in the oil and gas industry.[68]

The first step in the patent infringement analysis was to construe the claims in the patent through the eyes of the "person ordinarily skilled in the art" or "POSITA."[69] While expert evidence may be used to assist in this regard, the Court noted that it must be cautious in the use of evidence from the inventor of the patent, which is unlikely to be objective.[70] As the only evidence tendered by NuWave in support of its motion was an affidavit from one of the inventors of the patent at issue (who was also an owner of NuWave), the Court held that it would be inappropriate to use the evidence in the affidavit to construe the patent

[57] *Nova* at paras. 46 – 63.
[58] *Nova* at paras. 38 – 45.
[59] *Nova* at paras. 73 - 74.
[60] 2020 FC 1049 [*Mud Engineering FC*].
[61] *Mud Engineering FC* at paras. 9 – 11.
[62] *Mud Engineering FC* at para. 31.
[63] *Federal Courts Rules*, SOR/98-106, Rule 220.
[64] *Federal Courts Rules*, SOR/98-106, Rule 64.
[65] *Mud Engineering FC* at para. 20.
[66] 2020 FC 867 [*NuWave*].
[67] *Federal Courts Rules*, SOR/98-106, Rule 210.
[68] *NuWave* at paras. 1, 3.
[69] *NuWave* at para. 25.
[70] *NuWave* at paras. 28 – 32.

claims.[71] The Court further considered whether it should construe the claims without consideration of the affidavit evidence, and then proceed to consider validity and infringement based on the affidavit, but declined to do so given the inventor was not an unbiased expert witness and the Court "would essentially have to ignore material aspects of the only affidavit in the record" due to the inventor's insider knowledge and personal interest.[72] The Court also found in *obiter* that there were gaps in the evidence required to allow an accounting of profits by NuWave.[73]

Although the Court dismissed the proceedings, the decision was without prejudice to NuWave's ability to bring the motion again (or to proceed to trial).[74] The takeaway from this decision is that default judgment is an option to keep in mind where the party can lead sufficient evidence to establish its claims on a balance of probabilities.

Protecting Your Rights While Waiting for a Decision

Finally in 2020, the Federal Courts also addressed the preservation of rights during the interim period between filing a claim and judgment. Parties have a few options for preserving their rights pending a determination by the FC or a re-determination by the FCA. Two of those options were considered in the mining context this year.

In *Fluid Energy Group Ltd. v. Exaltexx Inc.*,[75] the FC granted an injunction preventing Fluid Energy Group Ltd. from sending cease and desist letters to Exaltexx Inc.'s suppliers. Both companies are competitors in the sale of "safe acids" to the oil and gas industry.[76]

The Court acknowledged that cease and desist letters can "serve laudable purposes," namely of providing notice and allowing the recipient to assess the claim and initiate settlement discussions.[77] However, the Court held that in this case, there was a serious issue to be tried as to whether the letters sent to the suppliers included false or misleading statements.[78]

Parties alleging infringement should note that sending threatening cease and desist letters to third parties based on tenuous connections to allegedly infringing products can be a step too far. Similarly, there are legal options available if your company is in receipt of this type of letter or knows of similar letters that have been sent to your customers and clients. Both the tone and content of cease and desist letters sent or received have to be calibrated and measured.

In *Western Oilfield Equipment Rentals Ltd. v. M-I L.L.C.*,[79] the FCA denied the appellants' urgent motion for an interim stay of the effect of an FC decision, pending the FCA's decision on a motion for a (longer) stay until the appeal is decided.[80] The FC awarded what might amount to over C$5 million dollars in damages and Western Oilfield Equipment Rentals Ltd. (Western) argued that requiring it to pay this amount immediately would lead to bankruptcy. [81]

In dismissing the motion, the FCA held that the evidence put forward did not establish irreparable harm. The evidence from Western's employees with respect to its funders' positions was held to be hearsay and insufficient given the amount of time that Western had to adduce direct evidence from those companies (25 days). The summary nature of the proceedings and tight timelines were no justification for the quality of evidence provided or to justify bending the rules of evidence.[82] Parties bringing a motion for such a stay should ensure there is sufficient evidence in support of the application.

Conclusion

The foregoing cases reflect important updates applicable to mining-related intellectual property cases. In particular, these developments provide important procedural and strategic tools to consider when litigating such claims.

[71] *NuWave* at paras. 33 – 35.
[72] *NuWave* at para. 37.
[73] *NuWave* at paras. 39 – 51.
[74] *NuWave* at para. 52.
[75] 2020 FC 81 [*Fluid Energy*].
[76] *Fluid Energy* at para. 8.
[77] *Fluid Energy* at para. 1.
[78] *Fluid Energy* at paras. 75, 95.
[79] 2020 FCA 3 [*Western Oilfield*].
[80] *Western Oilfield* at para. 1.
[81] *Western Oilfield* at paras. 2, 4.
[82] *Western Oilfield* at paras. 14 – 19.

Case Law Summaries

Tax

Kathryn Gullason

Teck Metals Ltd. v. British Columbia, 2020 BCSC 2065

In this appeal by Teck Metals Ltd. (Teck) of a tax assessment under British Columbia's *Mineral Tax Act* (MTA), the British Columbia Supreme Court concluded that Teck was entitled to claim 100% of its exploration costs incurred for the Galore Creek Mine (GC Mine) against the Highland Valley Copper Mine (HVC Mine), also owned by Teck.

In British Columbia, an operator of more than one mine in a year may have the exploration costs incurred in that year for one mine treated as exploration costs of another mine for the purpose of its mining tax assessments under the MTA. Teck and NovaGold Canada Inc. (NovaGold) operate the GC Mine in partnership (GC Partnership). Teck sought to claim 100% of its exploration costs for the GC Mine in 2010 and 2011 against the HVC Mine for the 2011 and 2012 fiscal years. The Commissioner of Mineral Tax issued two Notices of Assessment for the HVC Mine, which reduced the amount of exploration costs that Teck could claim from 100% to 50%. Teck appealed the assessments to the Minister of Finance (Minster), who affirmed the assessments.

Teck argued on appeal that it was obligated under its partnership agreement with NovaGold to pay 100% of the exploration costs for the GC Mine and, therefore, it was entitled to claim those costs on its mineral tax returns. The Minister argued that Teck was not obligated to pay the exploration costs directly, but instead contributed funds to GC Corporation, the general partner of GC Partnership, which incurred costs on GC Partnership's behalf. The Minister relied on s. 27 of British Columbia's *Partnership Act*, which makes partners jointly liable for the costs of a partnership unless they agree otherwise, which the Minister said operated to make both partners (Teck and NovaGold) jointly liable for the GC Mine's exploration costs. Therefore, Teck's proportionate share of the exploration costs was 50%, not 100%, and Teck could only claim 50% of the GC Mine's exploration costs against the HVC Mine.

The Court reversed the Minister's decision on appeal, finding that Teck was entitled to claim 100% of the exploration costs. The Court held that allocating the tax consequences to the partner who funded the expenditure is the rational approach and consistent with the provisions of the MTA. The Court's decision was also supported by the terms of the partnership agreement. The matter was referred back to the Minister for reassessment.

Torts

Miranda Lam, Meghan Bridges and Lindsay Burgess

Nevsun Resources Ltd. v. Araya, 2020 SCC 5

This decision is the latest instalment in respect of proceedings brought by a group of Eritrean nationals against Nevsun Resources Ltd. (Nevsun), a B.C. mining company, for alleged human rights abuses at a mine in East Africa. In this decision, the Supreme Court of Canada has permitted claims alleging violations of customary international law to proceed against Nevsun in British Columbia.

As we reported in *Mining in the Courts*, Vol. X, this is a representative action commenced by three Eritrean nationals against Nevsun in which the plaintiffs claim Nevsun is liable for forced labour, torture, crimes against humanity, and other abuses alleged to have occurred at Nevsun's Bisha Mine in Eritrea. The plaintiffs seek damages under international law and B.C. law. Nevsun brought two applications to strike the action on the basis of the act of state doctrine and customary international law, both of which were dismissed by the B.C. Supreme Court and the B.C. Court of Appeal. Nevsun was then granted leave to appeal to the Supreme Court of Canada.

On the issue of whether the claims were barred by the "act of state" doctrine, seven of nine judges of the Supreme Court of Canada concluded that the doctrine, which as advanced would prevent courts from ruling on whether the actions of a foreign state contravene international law, did not exist as a bar to adjudication of the plaintiffs' claims. Justices Côté and Moldaver, dissenting, concluded that the act of state doctrine applied and barred the plaintiffs' claims.

With respect to the claims for breaches of customary international law, Justice Abella, writing for a five-judge majority, concluded that it was not "plain and obvious" that the claims would not succeed and that breaches of customary international law could found a valid cause of action under Canadian common law. Justices Brown and Rowe, dissenting and concurred by Justices Côté and Moldaver, concluded that "breach of customary international law" is not a valid cause of action in Canada and it was plain and obvious that those claims would not succeed.

Three main points arise from the majority opinion: (i) *all* enforceable norms of customary international law have formed and continue to form part of the Canadian common law; (ii) remedies for violations of customary international law are not limited to actions against states and should include actions against private actors, including corporations; and (iii) there could be specific novel torts for breaches of customary international law that are distinct from existing torts.

This is the first time in Canadian legal history that the Supreme Court of Canada has concluded that all of customary international law forms part of Canadian common law, which is a significant departure from previous treatment of customary international law in Canadian common law. The Court's application of customary international law to corporations is also a significant change. Previously, customary international law was seen as applicable only to state actors and not to private actors such as corporations.

For more on this decision, see McCarthy Tétrault LLP's *Canadian Appeals Monitor* blog post entitled "Supreme Court of Canada cracks open the door for international human rights tort claims in Nevsun Resources Ltd. v. Araya.

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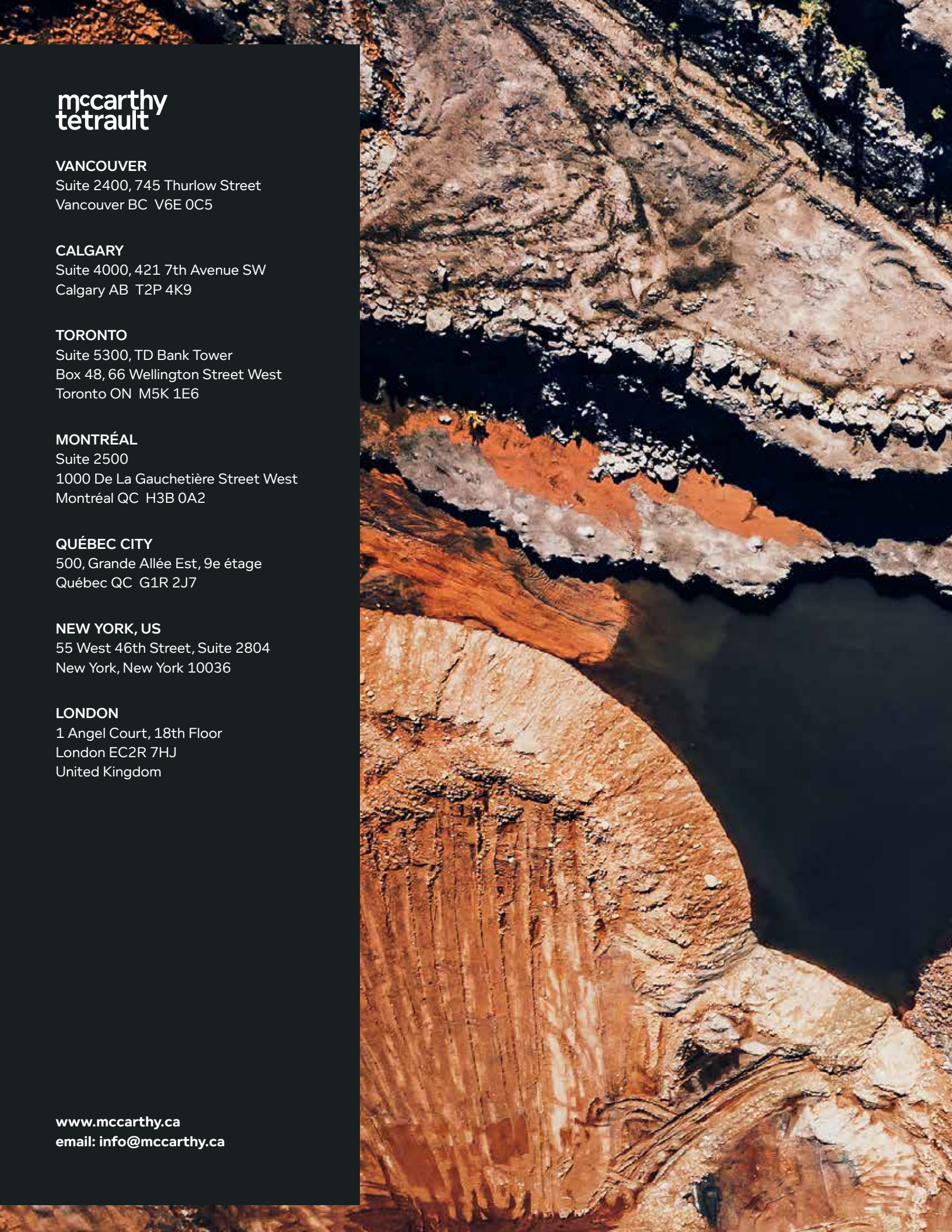

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