
# Mining in the Courts
## Year in Review

Vol. VIII – March 2018

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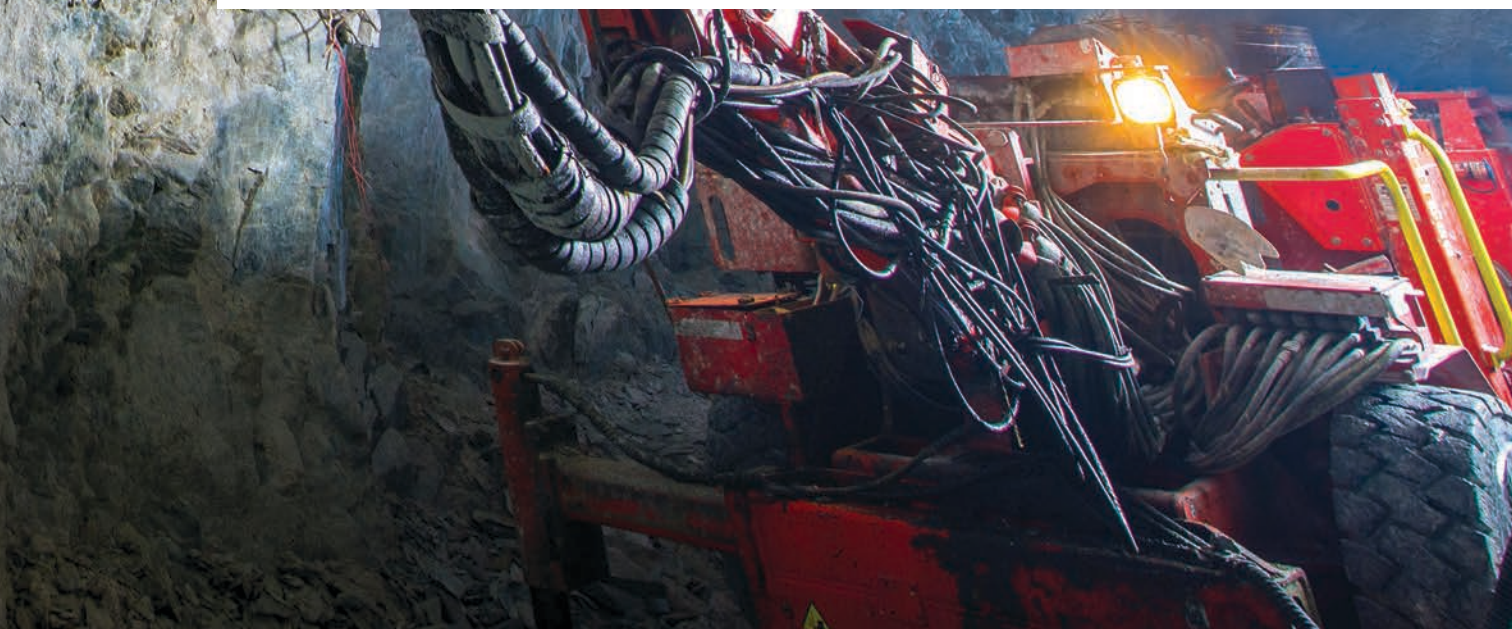

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# Welcome to *Mining in the Courts*, Vol. VIII

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

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

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

Interspersed with the case summaries are articles providing our insights on current legal trends and what the mining sector can expect in 2018. Noteworthy articles this year include *Aboriginal Spiritual Rights Charter Claim Dismissed by Canada's Highest Court: Key Takeaways for Mining Companies* (page 6), *Facilitation Payments Now Illegal Under Canada's Foreign Corruption Law* (page 23) and *Managing the Environmental Legacies of Mining Projects: Key Concepts and Trends in Reclamation Security* (page 44).

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

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# Aboriginal Spiritual Rights *Charter* Claim Dismissed by Canada's Highest Court: Key Takeaways for Mining Companies

*Bryn Gray and Stephanie Axmann*

In 2017, the Supreme Court of Canada (SCC) released three important decisions on the duty to consult with implications for mining companies. The first two decisions, *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*[1] and *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*,[2] considered the role of regulatory tribunals in fulfilling the duty to consult for two projects approved by the National Energy Board. The third decision, *Ktunaxa Nation v. British Columbia,*[3] considered a novel Aboriginal spiritual rights claim raised in opposition to a ski resort development in British Columbia.

While the first two decisions provided needed clarification in the law, the *Ktunaxa* decision is likely the most significant Aboriginal law case of the year for mining companies. This is not just because it was the first time the SCC was asked to consider an Aboriginal spiritual rights claim and the protections that may be afforded to it pursuant to freedom of religion protections under s. 2(a) of the *Charter* in addition to Aboriginal and treaty rights protections under s. 35 of the *Constitution Act*, 1982. It is also because there are large tracts of land throughout Canada that are subject to Aboriginal spiritual rights claims and there would likely have been significant repercussions for mining companies if the SCC had recognized that a claim of this nature was protected under s. 2(a) of the *Charter*. Instead, the SCC's decision had the effect of narrowing the scope of potential Aboriginal spiritual rights claims that may be protected

1. 2017 SCC 40.
2. 2017 SCC 41.
3. 2017 SCC 54.

under s. 2(a) of the *Charter* while affirming the existing protections and duty to consult requirements arising under s. 35 of the *Constitution Act*.

The decision also importantly confirms once again that Aboriginal groups do not have a veto over projects and that developments can proceed without consent if adequate consultation has occurred, except in limited cases of established rights, such as established Aboriginal title.

## Background

The Ktunaxa Nation Council sought to overturn the approval of a Master Development Agreement (MDA) issued by the British Columbia Minister of Forests, Lands, and Natural Resource Operations (Minister) on March 12, 2012 for a new ski resort on Crown land in the Jumbo Valley. The Ktunaxa Council challenged the Minister's decision on two grounds: (i) the project violated the Ktunaxa's freedom of religion under s. 2(a) of the *Charter* and (ii) the government breached its duty to consult. In both instances, the Ktunaxa argued that the development was taking place in a sacred area called Qat'muk that was home to the Grizzly Bear Spirit and that no accommodation of their spiritual rights was possible.

The Jumbo Valley has long been used for heli-skiing and the MDA was approved after more than two decades of negotiations and regulatory reviews related to the proposed ski resort, the base of which would be located on an abandoned saw mill site. These various review processes began in 1991 and included:

- The Commercial Alpine Ski Policy process to determine sole proponent status (completed in 1993);
- The Commission on Resources and the Environment process to determine the best uses of the land (completed in 1995);
- A 10-year environmental assessment process (completed in 2004 with the issuance of an Environmental Assessment Certificate);
- The development of a Master Plan (completed and approved in July 2007); and
- The development of a Master Development Agreement (approved in March 2012).

The Ktunaxa Council comprises four B.C. interior *Indian Act* bands. It participated in all of these reviews but only judicially challenged the MDA decision.

Despite their opposition, the Ktunaxa Council continued to engage in lengthy discussions with the Crown in an effort to find mutually satisfactory accommodation of their concerns. Several accommodation offers were rejected by the Ktunaxa Council, but these rejections did not explicitly identify the Grizzly Bear Spirit or the sacred nature of the Jumbo Valley as outstanding concerns that needed to be addressed.

After several years, the Minister advised the Ktunaxa Council that a reasonable consultation process had occurred and that approval for the resort could be given while accommodation discussions continued. The Ktunaxa Council subsequently adopted a "very different and uncompromising position" in 2009 that the process had not properly considered the sacred nature of the Jumbo Valley and that their spiritual concerns could not be accommodated. This was because a ski resort with lifts to glacier runs and permanent structures would drive the Grizzly Bear Spirit from Qat'muk and irrevocably impair their religious beliefs and practices.

Similar to the B.C. Supreme Court and B.C. Court of Appeal, the SCC dismissed the Ktunaxa's appeal on both grounds.

## Freedom of Religion

Chief Justice McLachlin and Justice Rowe for the majority concluded that the Ktunaxa's spiritual rights claim is not protected by s. 2(a) of the *Charter*. They held that there are two aspects of the right to freedom of religion, namely the freedom to (i) hold religious beliefs, and (ii) manifest those beliefs, and that neither were infringed upon in this case. The Minister's decision did not interfere with the Ktunaxa's freedom to believe in the Grizzly Bear Spirit or to manifest this belief. Instead, the Ktunaxa were seeking to protect the Grizzly Bear Spirit itself and the subjective spiritual fulfillment that they derive from it, neither of which are protected by s. 2(a) of the *Charter*:

> The state's duty under s. 2(a) is not to protect the object of beliefs, such as the Grizzly Bear Spirit. Rather, the state's duty is to protect everyone's freedom to hold such beliefs and to manifest them in worship and practice or by teaching and dissemination. In short, the *Charter* protects the freedom to worship, but does not protect the spiritual focal point of worship.[4]

In a concurring in result opinion, Justice Moldaver (and Justice Cote) held that the Minister's decision infringed s. 2(a) of the *Charter* because it would interfere with the Ktunaxa's ability to act in accordance with a religious belief or practice in more than a trivial or insubstantial manner. He held that where state conduct renders a person's sincerely held religious beliefs devoid of all religious significance, this infringes a person's right to religious freedom. In this case, he held that the development would render the Ktunaxa's religious beliefs related to the Grizzly Bear Spirit devoid of any spiritual significance.[5]

Despite this finding, Justice Moldaver concluded that the Minister's

4. *Ktunaxa Nation* at para. 71.
5. *Ktunaxa Nation* at para. 118.

decision was reasonable because it reflected a proportionate balancing between the Ktunaxa's s. 2(a) Charter right and the Minister's statutory objectives to administer Crown land and dispose of it in the public interest. By way of significant accommodation measures, the Minister tried to limit the impact of the development on the substance of the Ktunaxa's s. 2(a) right as much as reasonably possible given these objectives. Justice Moldaver held that permitting the Ktunaxa Council to veto development over the land on the basis of their freedom of religion would effectively transfer to them a significant property interest — namely a power to exclude others from constructing permanent structures on public land and regulating a vast area of public land so that it conforms to the Ktunaxa's religious beliefs. This would be inconsistent with the Minister's statutory mandate and would significantly undermine, if not completely compromise, it.[6]

Critics of the majority's decision, and to some extent the concurring in result reasons of Justice Moldaver, have argued that the SCC failed to consider or address the unique nature of Indigenous religious beliefs, in which individuals find spiritual fulfillment through their connection to the physical world, and in which land itself may be sacred and deserving of protection.[7]

**SECTION 35 PROVIDES THE RIGHT TO A *PROCESS*, NOT TO AN OUTCOME.**

## Duty to Consult

The SCC unanimously held that the Minister's conclusion that the Crown had met its duty to consult and accommodate with the Ktunaxa under s. 35 of the *Constitution Act*, *1982*, and thus his decision to approve the MDA, were reasonable.

The SCC held that the Crown's consultation with the Ktunaxa was properly characterized by the Minister as "deep" consultation and was adequate, even though the Ktunaxa ultimately did not achieve their desired outcome to cancel development of the resort in Qat'muk to protect the Grizzly Bear Spirit. In so finding, the Court highlighted several important principles of consultation. It noted that the steps in the consultation and accommodation process (first articulated by the SCC in *Haida Nation*[8]) are "offered as guidance to assist parties in ensuring that adequate consultation takes place," but the process is not intended as a "rigid test or a perfunctory formula."[9] Instead, what matters is "whether in fact the consultation that took place was adequate" and whether the process was

6. *Ktunaxa Nation* at para. 152.
7. *Ktunaxa Nation* at para. 127.
8. *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73.
9. *Ktunaxa Nation* at para. 81.

consistent with the honour of the Crown.[10] The SCC also emphasized that the right to consultation and accommodation is a right to a process and not a specific outcome:

> It is true, of course, that the Minister did not offer the ultimate accommodation demanded by the Ktunaxa — complete rejection of the ski resort project. It does not follow, however, that the Crown failed to meet its obligation to consult and accommodate. The s. 35 right to consultation and accommodation is a right to a process, not a right to a particular outcome: *Haida Nation*. While the goal of the process is reconciliation of the Aboriginal and state interest, in some cases this may not be possible. The process is one of 'give and take,' and outcomes are not guaranteed.[11]

## Key Implications for Mining Companies

This decision is significant for mining companies for several reasons outlined below.

**1. It restricts Aboriginal spiritual rights claims under the *Charter***

Through this decision, the SCC has restricted the types of Aboriginal spiritual rights claims that will engage freedom of religion protections under the *Charter*. In particular, the fact that certain land is sacred to an Aboriginal group does not mean that any development of that land would violate the freedom of religion of the specific group. The development must interfere in a non-trivial way with the Aboriginal group's ability to hold or manifest a particular religious belief, such as interfering with an Aboriginal group's ability to engage in a particular spiritual practice on a specific area of land. Even if an infringement of freedom of religion occurs, this does not mean that the development cannot proceed, because the religious freedoms of the particular Aboriginal group must be balanced with the relevant statutory objectives at issue.

While this does not affect any protection afforded to such claims under s. 35 of the *Constitution Act, 1982* and associated consultation and accommodation obligations, it does restrict the number of claims where a decision-maker would be required to undertake a separate *Charter* analysis and proportionality assessment if there was a breach of s. 2(a). Had the majority of the SCC found that the Ktunaxa's claim engaged the *Charter,* this would have likely resulted in a proliferation of *Charter* claims being raised with respect to Aboriginal spiritual rights in the context of resource development given the potentially more restrictive proportionality assessment that would be required.

In *Doré* and *Loyola,* the SCC held that where a *Charter* right is engaged in statutory decision-making, the decision-maker must balance the *Charter*

10. *Ktunaxa Nation* at para. 81 & 83.

11. *Ktunaxa Nation* at para. 114.

protections with the relevant statutory objectives to ensure that the *Charter* protections are affected as little as reasonably possible. It "works the same justificatory muscles" as the *Oakes* test for s. 1 of the *Charter*.[12]

Due to the majority's conclusions that s. 2(a) of the *Charter* was not engaged, the majority did not consider whether the proportionality analysis adopted in *Doré* and *Loyola* for administrative decisions impacting *Charter* rights needs to be modified in the context of an Aboriginal spiritual rights claim. On its face, this framework is a more narrow and restrictive analysis than what is considered for consultation and accommodation relating to an asserted Aboriginal spiritual rights claim. These claims, which are generally tied to land use, can raise considerations that go beyond the balancing of statutory objectives and *Charter* protections, such as competing claims of Aboriginal groups and broader societal interests and government objectives relating to specific land use. In the context of asserted rights, there is no minimal impairment type analysis that is required. This is only engaged in the context of established rights if an infringement can be proven.

The minority opinion did engage in a proportionality assessment, which suggested that broad Aboriginal spiritual rights claims that effectively amount to a power of exclusive use or veto over land use will not meet the proportionality test. However, this did not shed any light on what a court may do in the case of an Aboriginal spiritual rights claim that engages the *Charter* where the Aboriginal group does not put forward a position that amounts to a veto. Nevertheless, the decision further underscores the balance and compromise that is necessary on both sides in Aboriginal rights disputes and the risk that Aboriginal groups take in putting forward absolutist positions.

**RELIGIOUS FREEDOMS MUST BE BALANCED WITH OTHER RELEVANT OBJECTIVES.**

**2. It reaffirms that consultation is not a rights-determination exercise**

The assessment of rights in consultation is supposed to be limited to a preliminary assessment of strength of claim, but there is often a significant focus on strength of claim issues and assessments in consultation or attempts to have rights recognized in consultation processes or related judicial challenges.

The SCC reaffirmed that consultation is not a rights determination exercise and that rights-determinations cannot be made in judicial review processes or by administrative decision-makers (without express statutory authority) and instead must be proven by tested evidence in a trial:

> The Ktunaxa's petition asked the chambers judge to issue a

12. *Dore v. Barreau du Quebec*, 2012 SCC 12 at para. 5. See also *Loyola High School v. Quebec*, 2015 SCC 12 at para. 40

> declaration that Qat'muk is sacred to the Ktunaxa and that permanent construction is banned from that site. In effect, they ask the courts, in the guise of judicial review of an administrative decision, to pronounce on the validity of their claim to a sacred site and associated spiritual practices. This declaration cannot be made by a court sitting in judicial review of an administrative decision to approve a development. In judicial proceedings, such a declaration can only be made after a trial of the issue and with the benefit of pleadings, discovery, evidence, and submissions. Aboriginal rights must be proven by tested evidence; they cannot be established as an incident of administrative law proceedings that centre on the adequacy of consultation and accommodation. To permit this would invite uncertainty and discourage final settlement of alleged rights through the proper processes. Aboriginal rights claims require that proper evidence be marshalled to meet specific legal tests in the context of a trial. [Citations omitted.]
>
> Without specifically delegated authority, administrative decision makers cannot themselves pronounce upon the existence or scope of Aboriginal rights, although they may be called upon to assess the prima facie strength of unproven Aboriginal claims and the adverse impact of proposed government actions on those claims in order to determine the depth of consultation required. Indeed, in this case, the duty to consult arises regarding rights that remain unproven: *Haida Nation,* at para. 37.
>
> [Emphasis added.]

The SCC recognized the concerns raised by the Ktunaxa if their claimed right were not protected, but noted that "in the difficult period between claim assertion and claim resolution, consultation and accommodation, imperfect as they may be, are the best available legal tools in the reconciliation basket." The SCC also commented that injunctive relief to delay a project may also be available in such cases.[13]

In this case, the Ktunaxa argued that the consultation was inadequate because the Minister had failed to properly characterize or assess the right. The SCC disagreed and noted that it is possible for the Crown to mischaracterize a right and still fulfill the duty to consult, which underscores the benefit of engaging in deeper consultation to mitigate risk in areas where there are disputes about the strength of claim.[14]

**3. It emphasizes that consultation is a "two-way street"**

The SCC repeated the well-established principle that there are reciprocal obligations on Aboriginal groups to facilitate the process of consultation and accommodation by, among other things, setting out claims clearly

13. *Ktunaxa Nation* at para. 86.

14. *Ktunaxa Nation* at para. 104.

and as early as possible, not frustrating the Crown's reasonable good faith attempts at consultation, and not taking unreasonable positions to thwart the Crown from making decisions where agreement cannot be reached, despite meaningful consultation.[15]

In its review of the facts, the SCC noted the extensive consultation that took place over two decades, which in the Minister's view, had come to a conclusion in 2009. The SCC noted that there had been multiple occasions up to that point in which the Crown offered accommodation and the Ktunaxa had the opportunity to raise concerns, but they did not raise any specific concerns regarding the Grizzly Bear Spirit and the sacred nature of the Jumbo Valley. Rather, by 2009, the Minister had concluded that the Ktunaxa's outstanding concerns related primarily to interests other than their asserted Aboriginal rights and title claims.[16]

Only after the Minister had concluded consultation was complete, did the Ktunaxa first raise the specific concerns regarding the Grizzly Bear Spirit and take the new position that no accommodation was possible and that a complete rejection of the resort was the only solution. At that late stage, the Ktunaxa indicated that there was no point in any further consultation, although the Minister attempted to consult further. The late and uncompromising approach taken by the Ktunaxa in asserting their new claim was noted by all three levels of court, and in our view was not an insignificant factor in assisting the courts with reaching their decisions. This decision therefore sets a strong example of the importance placed by the courts on the reciprocal obligations of Aboriginal groups in consultation.

**ABORIGINAL GROUPS HAVE AN OBLIGATION NOT TO FRUSTRATE REASONABLE CONSULTATION EFFORTS.**

**4. It re-confirms that s. 35 provides a right to a process, not to a veto or the right to consent**

The SCC confirmed that the process of consultation does not provide any guarantee that the specific accommodation sought by an Aboriginal group will be warranted or possible. The ultimate obligation, rather, is that the Crown act honourably.[17] The Court went on to emphasize that the duty to consult does not provide Aboriginal groups a veto over development and that "where adequate consultation has occurred, a development may proceed without the consent of an Indigenous group."[18] The SCC reiterated that "consent is required only for proven claims, and even then only in certain cases," such as in cases of established Aboriginal title.[19]

15. *Ktunaxa Nation* at paras. 79 & 80
16. *Ktunaxa Nation* at para. 31.
17. *Ktunaxa Nation* at para. 79.
18. *Ktunaxa Nation* at para. 80.
19. *Ktunaxa Nation* at para. 83.

Justice Moldaver's concurring reasons regarding freedom of religion also recognized the difficult position that the Minister was placed in to either fulfill his statutory objectives or to provide the Ktunaxa with what would amount to a veto right against any development over 50 square kilometres of Crown land, on the basis of unproven claims. In his view, the Minister's rejection of such a veto right was reasonable in light of his statutory objectives, while limiting the Ktunaxa's right as little as reasonably possible.[20]

All in all, the *Ktunaxa* decision was likely the most significant duty to consult case released by the Supreme Court of Canada this year for mining companies. This case has provided needed clarification on the types of Aboriginal spiritual rights claims that can engage the *Charter* and reaffirmed a number of important principles in consultation for mining proponents. It remains to be seen how lower courts will grapple with future Aboriginal spiritual rights claims that do engage the *Charter* and whether the conclusions of future proportionality analyses diverge from the analysis of the same claim under s. 35 of the *Constitution Act, 1982* for the purposes of consultation and accommodation.

20. *Ktunaxa Nation* at paras. 119-120.

Case Law Summaries

# Aboriginal Law

*Aidan Cameron, Kate Macdonald, Jack Ruttle and Bianca Déprés*

## *CHIPPEWAS OF THE THAMES FIRST NATIONS V. ENBRIDGE PIPELINES INC. ET AL*, 2017 SCC 41

The Supreme Court of Canada considered a National Energy Board (NEB) approval to reverse the flow and increase the capacity of part of an existing pipeline in Ontario. The Chippewas of the Thames First Nation argued that consultation had been inadequate. The Court disagreed.

This case is an appeal from a decision discussed in *Mining in the Courts,* Vol. VI. In dismissing the appeal, the Supreme Court of Canada disagreed with the majority of the Federal Court of Appeal and found that the duty to consult had been triggered by the NEB decision, even though there was no separate Crown decision or Crown involvement in the process.

Unlike *Clyde River* (below), *Chippewas* concerned an existing project, and most of the required construction that had been approved was to take place on already disturbed lands owned by the project proponent. The Court noted that in the context of existing projects, the subject of consultation is the impact of the current decision at issue. The duty to consult is not a vehicle to address historical grievances. The process undertaken by the NEB was sufficient because the NEB provided the First Nations an adequate opportunity to participate, sufficiently assessed the potential impacts on the rights of Indigenous groups, and provided appropriate accommodation through the imposition of conditions on the proponent.

For more on this decision, and the related *Clyde River* decision see McCarthy Tétrault LLP's *Canadian ERA Perspectives* blog post entitled "Clarifying the Role of Regulatory Tribunals in Consultation – Canada's Highest Court Releases Two Key Aboriginal Consultation Decisions."

## *CLYDE RIVER (HAMLET) ET AL V. PETROLEUM GEO-SERVICES INC.*, 2017 SCC 40

In this companion decision to *Chippewas*, discussed above, the Supreme Court of Canada held that the Crown had not met its duty to consult and quashed the National Energy Board's (NEB) approval of a seismic survey program in Nunavut. The Hamlet of Clyde River, a mostly Inuit community, had applied for judicial review on the basis, among other things, that the Crown had consulted with affected communities only through the NEB process, which was not a substitute for formal consultation.

The Supreme Court of Canada decided that the consultation had been inadequate, but not because the NEB is an inherently insufficient forum for consultation. The Crown may rely in whole or in part on regulatory processes like the NEB to fulfill its duty to consult. However, where the regulatory process being relied upon does not achieve adequate consultation or accommodation, the Crown must take further measures to meet its duty. In this case, deep consultation was necessary given the Inuit's established treaty rights to hunt and harvest marine mammals, and the high risk of seismic testing affecting such rights. The NEB focused on adverse environmental impacts, but not on the specific impacts the program may have on the Inuit's traditional activities. It was also not made clear to the Inuit that the Crown was relying on the NEB to fulfill its duty, and the NEB provided the Inuit few opportunities to participate. In this case, consultation through the NEB alone was not enough.

## *FIRST NATION OF NACHO NYAK DUN V. YUKON*, 2017 SCC 58

In this case, the Supreme Court of Canada quashed Yukon's approval of a land use plan for the Peel Watershed region in northern Yukon. The Court's basis was that Yukon had made changes to the plan without consulting affected First Nations.

The Peel Watershed represents one of the largest intact wilderness watersheds in North America, and includes the traditional territories of several First Nations. Yukon, Canada and affected First Nations agreed to a collaborative land use planning process for the region, which was adopted in several land claims agreements (the Final Agreements). After years of consultation and research, an independent commission initiated the land use approval process by issuing its Recommended Plan for the region. Near the end of this approval process, and after the commission had released its Final Recommended Plan, Yukon adopted a modified land use plan that allowed for increased development in the region. Yukon adopted this modified plan without consulting the First Nations.

The Supreme Court of Canada noted that the Final Agreements, which determined the scope of Yukon's right to modify the Final Recommended Plan, must be interpreted in light of modern treaty interpretation principles.

Modern treaties are carefully negotiated, so close attention must be paid to their specific terms. These terms must also be read in light of the treaty and its objectives as a whole. Analyzing the Final Agreement's terms, the Court held that the word "modify" did not permit Yukon to make fundamental changes to the Final Recommended Plan, and that Yukon had to consult the First Nations when making any modifications. The Court quashed Yukon's approval of the plan, thereby returning the parties to the second round of consultation. In effect, this meant Yukon would not have a second opportunity to propose access and development modifications to the Recommended Plan.

For more on the background and significance of this decision, see McCarthy Tétrault's *Canadian ERA Perspectives* blog post entitled "*First Nation of Nacho Nyak Dun v. Yukon*: SCC addresses the role of courts in resolving modern treaty disputes".

## *KAINAIWA/BLOOD TRIBE V. ALBERTA (ENERGY)*, 2017 ABQB 107

In this decision, the Alberta Court of Queen's Bench refused to order Alberta to transfer certain subsurface rights to the Blood Indian Band, finding that the province had no legal obligation to do so. The Court nevertheless concluded that Alberta's decision was unreasonable, quashed the decision, and remitted the Band's request to the Minister of Energy for reconsideration.

The dispute arose out of two settlement agreements between the Band and Alberta, pursuant to which the Band had purchased surface rights to six parcels of lands. After Alberta refused to transfer the subsurface rights to those lands, the Band went to court.

The Alberta Court of Queen's Bench could not force Alberta to transfer the rights, because no legal obligation arose out of Treaty 7, the settlement agreements themselves or the honour of the Crown. These findings did not end the matter, however. Despite being constitutionally correct, the Court held that Alberta had unreasonably refused to transfer the rights to the Band. Reasonableness requires that the reasons for a decision be transparent and intelligible. Alberta's reasons fell short of this standard, and so the matter was remitted for reconsideration.

## *PROCUREUR GÉNÉRAL DE TERRE-NEUVE-ET-LABRADOR C. UASHAUNNUAT (INNUS DE UASHAT ET DE MANI-UTENAM)*, 2017 QCCA 1791

This decision is an appeal from a decision discussed in *Mining in the Courts*, Vol. VII, in which the Québec Superior Court held that it had jurisdiction to consider First Nations' claims for violation of Aboriginal title and rights not only within Québec, but beyond the Québec border in Labrador.

The case involves a claim by the plaintiff Innu communities for C$900 million in damages from Iron Ore Company of Canada (Iron Ore) and its subsidiary, the Québec North Shore and Labrador Railway Company, for infringement of Aboriginal title, Aboriginal rights and treaty rights, as well as for a declaration recognizing Aboriginal title over territory along the Québec-Labrador border region. The defendants operate a mine in Labrador City and operate a 418-kilometre railroad which links the mine to a facility in Sept-Îles, Québec.

**QUÉBEC COURTS HAVE JURISDICTION OVER ABORIGINAL TITLE CLAIMS IN LABRADOR.**

In the decision under appeal, the Attorney General of Newfoundland and Labrador applied, unsuccessfully, to strike portions of the pleadings related to the facilities located in Labrador, on the basis that the Québec Superior Court lacked jurisdiction over those claims.

The Court of Appeal affirmed the Superior Court's decision to dismiss the application. The Court agreed with the lower court that the claims were against Iron Ore and its subsidiary, not the Labrador government. Though the First Nations invoked violations of their Aboriginal rights, it was the faulty actions of private companies that were being challenged. Québec courts have jurisdiction over the claims because Iron Ore and its subsidiary's head offices are in Québec.

The Attorney General of Newfoundland and Labrador has sought leave to appeal to the Supreme Court of Canada.

## *PROPHET RIVER FIRST NATION V. CANADA (ATTORNEY GENERAL)*, 2017 FCA 15 AND *BRITISH COLUMBIA (MINISTER OF THE ENVIRONMENT)*, 2017 BCCA 58

In these related decisions, the Federal Court of Appeal and the British Columbia Court of Appeal each dismissed court challenges of the federal and provincial environmental assessment approvals for the Site C hydropower project in B.C.

The Prophet River First Nation and West Moberly First Nations are signatories to Treaty 8, which grants traditional hunting, fishing and

trapping rights. They oppose Site C on the basis that its environmental and ecological impacts will infringe these rights. The federal Governor in Council (GIC) and two B.C. Ministers issued approvals of Site C. In response, the First Nations applied for judicial review of the approvals, asserting that the Crown had infringed on their treaty rights and breached its duty to consult.

In 2017 FCA 15, the Federal Court of Appeal upheld the lower court's dismissal of the judicial review of the federal approval, holding that the GIC is neither equipped nor has the expertise to adjudicate on whether there was an unjustified infringement of treaty rights. Rather, the GIC makes decisions based on polycentric considerations and a balancing of interests. While the Crown's duty to consult was not at issue on appeal, the Court discussed the underlying consultation and accommodation that took place and noted that the First Nations had not fulfilled their reciprocal obligations because they had not provided adequate information to support their allegations of treaty infringement.

In 2017 BCCA 58, both treaty right infringement and the Crown's duty to consult were at issue in the review of the provincial Ministers' decision. On the infringement issue, the Court held that the Minister was not required to determine whether the project constituted an unjustifiable treaty infringement before approving Site C. Such a requirement was not within the Minister's statutory mandate, and so the Minister, like the GIC, did not have the means to make a proper determination. On the consultation issue, the Court found that there had been significant consultation with the First Nations, including with respect to alternatives to Site C. In the Court's view, the First Nations' position of suggesting only one form of accommodation — *i.e.*, not proceeding with the project — was tantamount to asserting a veto, which is inconsistent with Canadian law.

For more on the background and significance of these decisions, see McCarthy Tétrault's *Canadian Energy Perspectives* blog post entitled "Legal Challenges to Site C Dam by BC First Nations Dismissed by Federal Court of Appeal and BC Court of Appeal."

## *STONEY TRIBAL COUNCIL V. SHELL CANADA LIMITED,* 2017 ABQB 314

The Stoney Tribal Council brought a claim against Shell Canada Limited arguing that Shell had underpaid royalties on gas it obtained from reserve lands. Shell sought summary judgment to dismiss the Stoney's claim. In this decision, the Alberta Court of Queen's Bench refused to grant summary judgment, finding that there was merit to the Stoney's claim.

As Treaty No. 7 Bands, the Stoney have the use and benefit of certain reserve lands, and the Crown holds the rights to any subsurface minerals in trust for the benefit of the Bands. This, in the Court's view, creates a fiduciary, trust-like relationship between the Crown and the Bands. On behalf of the Bands, the Crown entered into mineral leases with Shell that required Shell to pay royalties to the Bands. The Stoney eventually accused Shell of underpaying these royalties and sued. In response, Shell argued that only the Crown had standing to sue on the mineral leases.

The Court found sufficient merit in the Stoney's claim to dismiss Shell's application. Although the beneficiary to a trust (the Bands) ordinarily cannot sue someone other than the trustee (the Crown), there was evidence that in this case the Crown had failed to perform its duty of securing additional royalties for the Bands. On this basis, the Court held that there was merit to the argument that the common law exception allowing a beneficiary to sue a stranger to the trust (Shell) applied.

## *WEST MOBERLY FIRST NATIONS V. BRITISH COLUMBIA,* 2017 BCSC 1700

In this decision, the British Columbia Supreme Court declared that the western boundary of Treaty 8 is the height of land along the continental divide between the Arctic and Pacific watersheds (the Arctic-Pacific Divide). A group of Treaty 8 First Nations had long argued that the western boundary was the Arctic-Pacific Divide. The province of British Columbia and the Kaska Dena Council, meanwhile, argued that the boundary actually runs along the Rocky Mountains, well east of the Arctic-Pacific Divide.

There has been uncertainty about Treaty 8's western boundary since at least 1909. To determine the issue, the Court reviewed large portions of the history of British Columbia and the circumstances in which Treaty 8 was created. It considered a vast array of historical sources and maps, as well as contemporary expert evidence and testimony.

# Class Actions

*Aidan Cameron, Kate Macdonald and Jack Ruttle*

## *AMMAZZINI V. ANGLO AMERICAN PLC*, 2016 SKCA 164

This case is an appeal from a decision discussed in *Mining in the Courts*, Vol. VII, in which the Saskatchewan Court of Queen's Bench ordered a conditional stay of a proposed multi-jurisdictional class action commenced in Saskatchewan in favour of a similar proceeding commenced in Ontario.

The proceedings concern allegations that DeBeers overcharged for gem grade diamonds by restricting the world supply and inflating prices. A similar proceeding was also commenced, and certified, in British Columbia.[1]

The Saskatchewan Court of Appeal affirmed the Court of Queen's Bench order conditionally staying the Saskatchewan proceeding. The Court of Appeal noted that the certification judge had incorrectly granted the representative plaintiff in the Ontario action standing to apply for a stay. However, the certification judge had ultimately reached the correct conclusion. The certification judge had an independent obligation to consider whether it was preferable that the matters raised in the Saskatchewan action be resolved in one of the multi-jurisdictional actions ongoing in other provinces. Applying this analysis, a conditional stay was appropriate, a conclusion the judge would have reached regardless of the Ontario plaintiff's submissions. The certification judge's incorrect decision to grant the Ontario plaintiff standing to make an application was thus not determinative, and the appeal was dismissed.

For more on this decision, see McCarthy Tétrault LLP's *Canadian Class Actions Monitor* blog post entitled "The Role of Representative Plaintiffs from Other Jurisdictions: An Update."

1. Decisions in the B.C. proceeding (including the certification decision) have been discussed in previous versions of *Mining in the Courts*. See *Mining in the Courts*, Vol. II, III, V (certification decision) and VI.

## *BRANT V. DE BEERS CANADA INC., 2016 ONSC 7515*

In this decision, the Ontario Superior Court of Justice granted the consent certification of the Ontario class proceeding against DeBeers, which was commenced in relation to their alleged overcharging for gem grade diamonds.

The basis for granting the consent certification was that the Ontario representative plaintiff, as well as the representative plaintiffs in the related British Columbia and Quebec class proceedings, had entered a settlement agreement with DeBeers. This decision is part of the first phase of the intended settlement process, in which consent certifications are sought for each of the class actions. The second phase will be motions to approve the settlement itself.

The settlement agreement is contingent, however, on the outcome of the Saskatchewan class proceeding discussed above. At the time this decision was issued, the Saskatchewan plaintiff was not a party to the settlement agreement, and he opposed the Ontario consent certification. The settlement agreement may be terminated if either the Saskatchewan Court of Queen's Bench declines to permanently stay or dismiss the Saskatchewan proceeding, or if an eventual Queen's Bench order staying or dismissing the proceeding is overturned and all appeals are exhausted.

The settlement process, and the interconnected Saskatchewan class proceeding, are ongoing.

# Facilitation Payments Now Illegal Under Canada's Foreign Corruption Law

*John Boscariol, Robert Glasgow, and Claire Seaborn*

On October 31, 2017, the federal government brought into force a pending amendment to the *Corruption of Foreign Public Officials Act* (CFPOA), which is likely to have a significant impact on many Canadian firms operating abroad, especially in the mining sector. Effective October 31, so-called "facilitation payments" — payments to low-level government officials to expedite or secure the performance of an act of a routine nature — are considered illegal. Violations of the CFPOA have, historically, resulted in fines in the C$10 million range for corporations, and can now attract prison terms of up to 14 years for individuals.

This amendment, which had been held in abeyance for over four years to allow companies to adjust their practices, was brought into force with only 24 hours' notice. Companies must immediately review their current practices and procedures to ensure that they have properly implemented controls to prevent any such payments going forward. This may present significant challenges for mining companies operating in countries where such payments are commonplace.

The change flows from amendments made to the CFPOA back on June 19, 2013. Prior to the amendments, concerns had been raised that Canada could do more to fight international corruption by its citizens

and corporations. As such, the amendments to the CFPOA focused on improving enforcement by, among other things, imposing "nationality jurisdiction" (which expanded the ability of the government to charge Canadian entities and individuals regardless of the jurisdiction where the acts took place) and the creation of a books and records offense to criminalize improper or fraudulent bookkeeping in connection with making or hiding bribes.

However, one aspect of those amendments was held in abeyance: a repeal of the section of the CFPOA that created an exemption for facilitation payments. At the time, the Canadian government made clear that this was being postponed so that companies would have an adjustment window to change practices and policies in order to eliminate these payments, although no time frame was given as to when the actual termination of the exemption would take effect.

## What are Facilitation Payments?

Facilitation payments are aptly named — they are payments made to a public official to facilitate a government action of a routine nature, but exclude decisions to award or continue business. To some, these may simply appear to be bribes but on a smaller scale. To some degree it is a question of the character of the action requested. That is, a facilitation payment usually must be made only to obtain a right or action to which the payee was already entitled. The payee is not paying the official to change, alter, or make a decision that would not otherwise be made. For this reason they are sometimes known as "grease payments" — they simply speed the way to a decision.

For example, paying a customs official to prioritize your paperwork so your goods, which were legal and entitled to an import permit, receive their permit speedily would likely be a facilitation payment. However, paying a customs official to change the designation on your goods so you may benefit from an exemption to which they are not otherwise entitled would not.

In our experience there are several areas in the mining sector that are vulnerable to facilitation payments. These include things such as per diem payments to government inspectors or other officials conducting visits to project sites, payments to filing clerks or other bureaucrats in local registrar offices for the filing of permits and other official documents, payments to local court officials to expedite the hearing of disputes in local courts, and arrangements made with local police or other law enforcement officials.

## Divergent Examples — the United Kingdom and the United States

Usually we expect to see convergence among key players in the fight against corruption. However, in this case there are two divergent models. On the one hand, the United Kingdom's *Bribery Act*, which came into force

on July 1, 2011, has not recognized the legality of facilitation payments and does not draw any distinction between facilitation payments and bribes. Conversely, the United States' *Foreign Corrupt Practices Act* (FCPA) maintains an exemption, albeit a narrow one, for "grease payments." The FCPA exception applies only to payments made to foreign officials with the purpose to "facilitate or expedite routine government action." The exception has been strictly interpreted in certain U.S. court judgments, such as *United States v. Duperval,* which has introduced some confusion as to when and to whom it could apply. It should be noted that because of the challenges in determining whether payments may clearly fall within this exception, many U.S. companies have chosen to prohibit them regardless of their legal status.

This uncertainty may act as support for Canada to take the position it does, namely, that any illicit payment to a government official is a bribe. Introducing the concept that certain payments may be allowed based on an interpretation of whether the requested action is of a routine governmental nature creates uncertainty. Bright line rules are easier for companies to implement, easier for companies to monitor and easier for administrations to enforce.

**THE MINING SECTOR IS VULNERABLE TO FACILITATION PAYMENTS.**

One disadvantage of adopting such a bright line approach is that this puts Canadian companies at a competitive disadvantage over companies from jurisdictions that do not ban facilitation payments. Those U.S. companies that are prepared to make these kind of exempt payments (and comply with any applicable FCPA record-keeping and internal control requirements) now arguably have a greater degree of flexibility in ensuring that their routine actions, such as processing of permits or paperwork, are expedited. However, depending on the jurisdiction, this competitive disadvantage may be minimized by taking advantage of the other exemptions that are still available under the CFPOA.

## Defences Still Available

Even after the amendments to CFPOA, there remain several defences or exemptions that continue to be available for certain payments made to foreign officials. One such exemption relates to *bona fide* payments to officials (i) for valid promotional or demonstrative expenses, such as those for hospitality, meals, entertainment and other marketing activities, or (ii) related to the execution or performance of a contract with the foreign state. These exemptions are fairly limited but may cover certain payments that were previously exempted as facilitation payments.

Another defence allows for payments that are legal in the jurisdiction in which they are made. For example, in certain jurisdictions it is common to allow entities to pay government employees that are conducting inspections of the company's facility a *per diem* to compensate the inspector for travel, food and other costs. These payments are usually

limited by specific statutory language. So long as the payment meets the requirements of local law for a permitted *per diem*, then there is no CFPOA violation.

These deserve a closer look by entities that have paid what would previously have been described as facilitation payments. This is particularly true in jurisdictions that allow for *per diem* and other specific types of payments to public officials for the performance of their duties. The removal of facilitation payments as a defence of first instance may drive companies to more rigorously analyze the laws of the jurisdictions in which they have projects to better buttress any claims regarding the legality of their payments.

## Conclusions

The CFPOA changes will likely have an immediate impact by greatly influencing what defences may be available for Canadian entities conducting business in high corruption jurisdictions. Implementing the proper policies to ensure local pressure does not cause criminal liability will be important for Canadian entities in the future. If they have not already done so, companies operating in countries where grease payments are common should be considering and implementing strategies to avoid circumstances in which these payments will be requested and, where that is not possible, taking appropriate responsive action, including escalation to senior government officials if that is a viable option.

**COMPANIES OPERATING WHERE GREASE PAYMENTS ARE COMMON NEED STRATEGIES TO DEAL WITH THE ISSUE.**

It will also be very important for U.S. entities with either a Canadian subsidiary, or a Canadian presence (such as through listing or cross-listing on the TSX) to review their internal compliance controls. Previously, the U.S. and Canadian regimes were roughly aligned on this issue, and a single policy regarding such payments could apply equally across the board. Under the new regime this approach may continue, but only if the more stringent Canadian standard is adopted.

Divergence between U.S. and Canadian anti-corruption regimes continues to present challenges for companies operating from both jurisdictions. Another example is the recent U.S. repeal of the Securities and Exchange Commission resource extraction issuers rule, which required project-level reporting of payments to U.S. and foreign governments. The Canadian version of these "publish what you pay" rules, the Extractive Sector Transparency Measures Act (ESTMA), is broader in scope and remains in force today.

Case Law Summaries

# Conflicts and Jurisdiction

*Aidan Cameron, Kate Macdonald and Jack Ruttle*

## *ARAYA V. NEVSUN RESOURCES LTD.*, 2017 BCCA 401

This is an appeal from a decision discussed in *Mining in the Courts*, Vol. VII, in which the British Columbia Supreme Court permitted claims to proceed against a Canadian resource company in a trial relating to alleged human rights abuses at a mine in East Africa.

The plaintiffs, three Eritrean nationals who are now refugees in Ethiopia, commenced a representative proceeding against Nevsun Resources Ltd., a B.C. mining company, in connection with the Bisha Mine in Eritrea. The plaintiffs claimed they were forced to work at the mine by the Eritrean military under construction agreements with Nevsun and its Eritrean subsidiary. They sought damages on behalf of all Eritreans forced to work at the mine, based on alleged breaches of customary international law for alleged torture, slavery, cruel, inhuman and degrading treatment, and crimes against humanity. They also sought damages under domestic B.C. law for the torts of conversion, battery, unlawful confinement, negligence, conspiracy, and negligent infliction of mental distress.

Nevsun brought four applications to halt the claims, arguing that: 1) Eritrea is the more appropriate forum; 2) the plaintiffs' claims are barred by the act of state doctrine; 3) breaches of customary international law are not justiciable; and 4) the case is not appropriate for a representative proceeding. The B.C. Supreme Court accepted the fourth argument, ending the representative proceeding, but dismissed the first three. Nevsun appealed.

The B.C. Court of Appeal upheld the lower court's decision. On the forum argument, the Court concluded that there was a real risk that a trial in Eritrea would be unfair, which outweighed the expense and inconvenience of conducting the trial in B.C. On the act of state argument, the Court held that the doctrine was not engaged in this case. Even if it was, the grave nature of the wrongs asserted, and the fact that this case would not be an inquiry into the actions of a foreign sovereign, both militated against applying the doctrine. Finally, the Court found that although the plaintiffs would face significant legal hurdles in pursuing their customary international law claims, those claims were not bound to fail.

Nevsun has sought leave to appeal to the Supreme Court of Canada.

## *YAIGUAJE V. CHEVRON CORP.*, 2017 ONSC 135, 2017 ONCA 741 AND 2017 ONCA 827

In 2015, the Supreme Court of Canada (SCC) held that Ontario courts have jurisdiction to adjudicate a recognition and enforcement action against an Ontario affiliate of a foreign corporation (as discussed in *Mining in the Courts,* Vol. VI). *The* case involves an attempt to enforce an Ecuadorian judgment in Ontario against Chevron and Chevron Canada. Chevron Canada is a wholly-owned subsidiary of Chevron, but was not a party to the Ecuadorian case.

As a result of the SCC's decision, the Ecuadorian plaintiffs' action was allowed to continue. But the Court left open the question of whether the assets of Chevron Canada, as a separate entity from Chevron, remained available to satisfy the Ecuadorian judgment.

In 2017 ONSC 135, the Ontario Superior Court of Justice held that Chevron Canada's assets were unavailable to satisfy the judgment, and dismissed the plaintiffs' enforcement action. Chevron Canada is not an asset of Chevron, and the Ontario *Execution Act,* which the plaintiffs relied on, is procedural and does not create a right to an asset not owned by the judgment-debtor. The Court refused to pierce the corporate veil to allow for enforcement. The principle of corporate separateness precluded this because the plaintiffs could not show that Chevron completely controlled Chevron Canada in order to use it as a shield for an improper or fraudulent purpose.

The Court also considered the plaintiffs' motion to strike Chevron's defences to the enforcement action. The results were mixed, with the Court striking two of Chevron's defences, while refusing to strike three defences relating to whether the Ecuadorian court had jurisdiction over Chevron, had issued a fraudulent judgment, or had denied Chevron Canadian standards of natural justice and fairness.

The plaintiffs appealed the dismissal of the enforcement action.

In a preliminary motion to that appeal, Chevron and Chevron Canada sought security for costs against the plaintiffs. They succeeded initially (2017 ONCA 741), but the Court of Appeal ultimately vacated the motion judge's order (2017 ONCA 827) and the plaintiffs were ultimately not required to post security for costs.

The security for costs decisions may, to an extent, foreshadow the

plaintiffs' chances of success on appeal. The motions judge, in granting security for costs, found that the plaintiffs were unlikely to succeed on appeal. But the Court of Appeal gave a more positive appraisal of the merits of the plaintiffs' appeal, finding some merit in the argument that Chevron Canada's shares are exigible under the *Execution Act,* and noting that the plaintiffs are pursuing novel arguments to pierce the corporate veil. Regarding the latter, the Court alluded to the potential for modifications and revisions to the common law. Other unique circumstances of the appeal required that there be no security for costs, including that the matter is public interest litigation, and that Chevron and Chevron Canada, which both have annual gross revenues in the billions of dollars, do not need protection for the cost award it may obtain.

For more on the twists and turns of this ongoing enforcement action, see the McCarthy Tétrault LLP's *Mining Prospects* blog posts entitled "Yaiguaje v. Chevron Corporation – The Enforcement Saga Continues," "Yaiguaje v. Chevron Corporation - The Latest Development in the Enforcement Proceedings" and "Ontario Court of Appeal Overturns Security for Costs Order in Yaiguaje v. Chevron Corporation."

# Constitutional

*Aidan Cameron, Kate Macdonald and Jack Ruttle*

## *ERNST V. ALBERTA ENERGY REGULATOR*, 2017 SCC 1

In this decision, the Supreme Court of Canada split 4-4-1 over the constitutionality of an immunity clause in favour of the Alberta Energy Regulator, and, in the end, resolved the case largely on procedural grounds.

Ms. Ernst frequently criticized the Alberta Energy Regulator, a quasi-judicial tribunal that regulates the Alberta oil and gas industry. In response, the regulator excluded her from its public complaints process. Ms. Ernst brought a claim alleging that the regulator's actions had breached her right to freedom of expression under s. 2(b) of the *Charter* and sought *Charter* damages. The regulator applied to have the claim dismissed, arguing that it was protected by an immunity clause under provincial legislation. Ms. Ernst in turn argued that the immunity clause was unconstitutional, but she did not raise this argument in the courts below.

**DAMAGES ARE NOT AN APPROPRIATE REMEDY FOR *CHARTER* BREACH BY REGULATOR.**

The three issues the Supreme Court considered were whether: (i) it was plain and obvious that the immunity clause barred Ms. Ernst's claim; (ii) it was plain and obvious that *Charter* damages were not an appropriate remedy for a *Charter* breach by the Regulator; and (iii) Ms. Ernst's failure to provide notice of her constitutional challenge was fatal to her claim.

Justice Cromwell (joined by Justices Karakatsanis, Wagner, and Gascon) struck Ms. Ernst's claim, considering only the first two issues. They accepted Ms. Ernst's concession that the immunity clause, on its face, barred her claim for *Charter* damages, and held that *Charter* damages could never be an appropriate remedy for a *Charter* breach by the Regulator given that judicial review was the preferable remedy. Chief Justice McLachlin and Justices Moldaver and Brown (joined by Justice Côté) dissented, holding that it was possible that *Charter* damages could be an appropriate remedy against the Regulator given the novelty of Ms. Ernst's claim. They also refused to accept Ms. Ernst's concession and found that the relationship between the immunity clause and the *Charter* was not plain and obvious. Finally, Justice Abella, focusing on the third issue, held that Ms. Ernst's failure to provide notice of her constitutional challenge was fatal to her claim, and agreed with Justice Cromwell that the claim should be struck.

For more on this decision and its arguably limited precedential value, see McCarthy Tétrault LLP's *Canadian Appeals Monitor* blog post entitled "The Supreme Court of Canada provides limited guidance on the constitutionality of immunity clauses for tribunals."

# When does a Royalty Interest Constitute an Interest in Land?

*Sean Collins*

Royalty agreements are an important tool in the mining industry to advance projects. However, they are also challenging to negotiate and care must be taken with the language used to establish them.

One of the key considerations is whether or not a royalty agreement creates an interest that is attached to the land under which the mineral is located, or whether it is merely a contractual obligation on the part of the mining company to pay the royalty holder a specific amount in the event of production and sale of a mineral.

The difference between the two is subtle, but significant, because an attachment to land has far-reaching implications in the event of a future sale or insolvency.

When courts interpret royalty agreements to determine whether the royalty constitutes an interest in land, the issue turns on the interpretation of the royalty agreement and whether the "[L]language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right…"[1]

Courts examine the intention of the parties as expressed in the language used in the relevant agreement, and the case law identifies a number of factors that judges look for, including whether:

1. the agreement specifically states that the royalty interest is intended to run with the land or create an interest in land;
2. the agreement purports to bind subsequent owners of the property (perhaps by a restrictive assignment clause), as opposed to just successors of the payor;
3. the royalty agreement grants an interest in minerals in situ as opposed to a right to payment once minerals are extracted;

1. *Bank of Montreal v. Dynex Petroleum* 2002 SCC 7 at para. 2.

4. there is a right to receive the royalty in kind as opposed to just payments of money;
5. the royalty is one that is reserved by a seller of the subject property, as opposed to one granted by an owner of the subject property to a third party; and
6. there is a right or requirement to register the royalty, and the royalty is actually registered against title.

As discussed below, the recent decision in *Walter Energy Canadian Holdings, Inc., (Re)*,[2] addresses this topic and has some important lessons for those structuring agreements related to royalty interests. In *Walter Energy,* a decision involving the *Companies' Creditors Arrangement Act* (CCAA) proceedings of Walter Energy Canada Holdings, Inc., the British Columbia Supreme Court determined that a gross overriding royalty interest did not constitute an interest in land.

## Importance of the Characterization in Insolvency Proceedings

The characterization of a royalty interest is usually not an issue when dealing with solvent counterparties who are performing their obligations under a royalty agreement. However, when the royalty payor becomes insolvent, there is often a competition between the royalty payor's creditors and the holders of royalty interests. That was the case in *Walter Energy*.

## The *Walter Energy* Decision

Walter Energy entered creditor protection under the CCCA and sought to restructure its affairs. A sale process was conducted and Conuma Coal Resources Canada agreed to purchase properties in British Columbia, including the shuttered Wolverine mine, whose license to mine coal was subject to a royalty agreement. Conuma, however, indicated that it was not going to assume that royalty agreement, which would leave the royalty holder as a creditor of Walter Energy.

The royalty holder objected to the sale and argued that his rights could not be extinguished by the transfer of the licenses and that the royalty rights "run with the land."

2. 2016 BCSC 1746.

The pertinent provision in the royalty agreement stated:

> "2. Consideration
>
> 2.1 As consideration for advancing the funds, the Company will pay a royalty (the "Royalty") of one percent (1%) of the price (FOBT at Port) for all product tonnes produced from the … Coal Properties on a quarterly basis to the Investors …"

The royalty holder argued, among other things, that the royalty agreement was an interest in the underlying mineral leases. The four main arguments advanced by the royalty holder included: (i) the royalty was to be based on the product that was "produced from the properties;" (ii) the holder was entitled to obtain the coal licenses back upon forfeiture; (iii) the royalty had no end date and therefore would last in perpetuity; and (iv) the royalty agreement was binding, by its terms, upon purchasers.

The Court reviewed the leading Canadian authorities on the issue and noted the absence of any provision in the agreement that purported to confer to the holder an interest in land. The Court stated that the grant of a royalty interest, without more, simply creates a contractual obligation to pay money and does not give rise to an inference that the parties intended to create an interest in the underlying mineral property. In this case, it was fatal to the holder's claim that there was no conveyancing language in the agreement assigning rights to him in the underlying mineral licenses and properties.

**ROYALTY INTEREST CREATES CONTRACTUAL OBLIGATION ABSENT CLEAR EVIDENCE TO THE CONTRARY.**

Instead, the Court held that the royalty agreement was merely contractual in nature and permitted the sale to proceed without the purchaser being required to assume the obligation under the royalty agreement. The royalty holder was left with an unsecured damage claim against Walter Energy for the damages sustained as a result of the disclaimer of the royalty agreement.

## Conclusion

The outcome in this case is not particularly surprising, given the wording of the royalty agreement. However, the case serves as an important warning to those entering into royalty agreements. If the intention is to create an interest that binds and runs with the underlying mineral property, then scrupulous care and detail must be taken when documenting and executing the transaction to ensure that it can survive a court's scrutiny and to avoid the likelihood that a judge will see it as just another contract.

# Contracts

*Aidan Cameron, Kate Macdonald and Jack Ruttle*

## *IFP TECHNOLOGIES (CANADA) INC. V. ENCANA MIDSTREAM AND MARKETING*, 2017 ABCA 157

This case involved a number of issues. Of particular interest for the mining industry is the interpretation of the phrase "working interest" in an oil and gas development contract.

IFP Technologies (Canada) Inc., a research and development company, entered a series of agreements with an oil and gas partnership in relation to a thermal project in Alberta. Pursuant to the parties' "Asset Exchange Agreement," IFP received a 20% "working interest" in the partnership's petroleum and natural gas rights to the site. A dispute arose over, among other things, the meaning of "working interest." IFP argued that it related to *all development and production from the site,* regardless of the method of extraction, while the partnership maintained that it related only to *thermal and other enhanced recovery from the site*.

On this issue, the Alberta Court of Appeal sided with IFP. A "working interest" is a legal term of art that carries a specific meaning. In mining, the term in relation to mineral substances *in situ* is a particular kind of property right or interest in land. When the owner of minerals *in situ* — which, in Canada, is generally the Crown — leases the right to extract minerals, that right is known as a "working interest." The term equates to the percentage of ownership that an owner has to explore, drill and produce minerals from the lands. Based on this understanding of "working interest," the Court concluded that what IFP had received was a 20% interest in *all* of the partnership's production from the site, regardless of extraction method.

Encana has sought leave to appeal to the Supreme Court of Canada.

## *ILLIDGE V. SONA RESOURCES CORPORATION*, 2017 BCSC 1326

In this case, the British Columbia Supreme Court was asked to determine the time by which a party was required to obtain a bankable feasibility study in

circumstances where the parties had not agreed on a specific date.

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

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

# The Precautionary Principle: An Epidemic of Intrusion Upon State Sovereignty

*Paul Cassidy and Leah Whitworth*

Since the Supreme Court of Canada (SCC) first referenced it in 2001, the precautionary principle has become a popular and controversial topic in Canadian environmental litigation. The SCC's first reference to the principle was in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, a decision in which the Court referred to a definition of the principle from the Bergen Ministerial Declaration on Sustainable Development:

> […] where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.[1]

While, as set out in the Bergen Declaration, the principle is only meant to be invoked in situations where threats rise to the level of "serious or irreversible damage" this limitation has been largely ignored: 16 years later, the mere "possibility" of harm appears sufficient to invoke the principle.

Moreover, while the principle has appeal for conservation purposes, there is currently a misunderstanding about the actual legal status of this rule. The precautionary principle has not, in fact, been recognized as an international

1. *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson* (Town), 2001 SCC 40, [Spraytech].

law, custom or convention, and has not been adopted in Canadian common law. As a result, its application in domestic Canadian law should be narrow. Its use in circumstances where it is not expressly made applicable by statute, such as in cases of legislative ambiguity, constitutes an undue infringement on parliamentary intent, the administrative decision-making process and state sovereignty. Yet, the principle stubbornly persists in the public mind, in some court rooms, and throughout the political realm.

How did we get here, and where is the principle headed in Canada?

**1. The Precautionary Principle is not recognized as Customary International Law**

Countries enjoy sovereignty over enactment of domestic law, but additional obligations can be imposed on they and their citizens through the operation of "international custom."[2]

For a principle to obtain the status of customary international law, it must be supported by substantial uniformity in state practice and *opinio juris*, which occurs when states comply with a principle under the presumption that they are legally bound to the rule.[3] To evaluate state practice and the accompanying *opinio juris*, the prevalence of the rule in domestic and international legal instruments is assessed alongside accompanying state attitudes and treatment.[4]

The SCC has acknowledged that the application of the precautionary principle has been advocated for, but the Court has not recognized the principle as having the status of customary international law.[5] Rather, the Court has classified the precautionary principle as an emerging principle of international law:

> …there may be "currently sufficient state practice to *allow a good argument* that the precautionary principle is a principle of customary international law."[6]

2. United Nations, *Statute of the International Court of Justice*, June 26, 1945, 59 Stat. 1055, 3 Bevans 1179, art 38; *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, 8 ILM. 679 art 38 (entered into force Jan. 27, 1980).

3. *Kazemi (Estate) v Islamic Republic of Iran*, 2014 SCC 62 at 38 *[Kazemi Estate]; R v Hape*, 2007 SCC 26 at 46.

4. *Case concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America),* [1986] ICJ Rep 14, at 187.

5. Customary international law has historically developed from globally accepted prohibitions on human rights violations or war crime. This realm of law is compatible with international custom, as social and economic factors play a limited role and subjectivity in application can be reduced through absolute prohibitions. See for example Soyoung Jung, "A State's Sovereign Rights and Obligations in the WTO to Harmonize Environmental Policies" (2013) 21:2 Mich. St. U. Coll. L. J. Int'l L. at 465.

6. *Spraytech* supra note 1 at 32; James Cameron and Juli Abouchar, "The Status of the Precautionary Principle in International Law" in David Freestone and Ellen Hey eds., *The Precautionary Principle and International Law*. The Hague: Kluwer Law International, 1996 at 52 (emphasis added).

Such an acknowledgement falls short of a statement that Canadian domestic law includes the precautionary principle.

The failure of Canada's highest court to adopt the precautionary principle into Canadian law mirrors the attitude of international courts, which have also refused to recognize the principle as customary international law. For example, in the *Indus Waters Treaty Dispute*, the Permanent Court of Arbitration (the PCA) refused to recognize the precautionary principle as international custom and subsequently declined to apply the principle to interpretation of a treaty.[7]

The sporadic incorporation of the precautionary principle into selective Canadian statutes further supports the conclusion that the rule has failed to crystalize into either domestic or international custom. While Parliament has amended statutes such as the *Canadian Environmental Protection Act*, the *Oceans Act* and the *Species at Risk Act* to include the principle, many environmental statutes in Canada remain conspicuously silent on the principle.[8] In *Kazemi Estate*, the SCC was tasked with determining whether an exception to foreign immunity in civil proceedings had become customary international law. In ruling that the exception had not reached customary status, the Court specifically noted the explicit statutory exception to foreign immunity for criminal proceedings and the legislature's decision to "stop short" of extending this exception to civil claims.[9] Applying this reasoning, the selective codification of the precautionary principle in Canada is an indicator that it is neither a domestic nor international customary law.

**2. The Precautionary Principle is Incompatible with Customary International Law**

Beyond its lack of recognition by courts and evidence that Canadian legislatures have not intended to ingrain the principle as accepted international law, the precautionary principle is incompatible with the central tenets of customary international law.

The threshold for recognition of customary international law is high; states must apply the rule "both extensive[ly] and virtually uniform[ly]."[10] The principle's definitional variability renders it incompatible with

7. Permanent Court of Arbitration, *The Islamic Republic of Pakistan v India in the Matter of the Indus Waters Kishenganga Arbitration*, Partial Award of 18 February 2013 [*Indus Waters Treaty Dispute*], as cited in Pederson, "From Abundance to Indeterminacy: the Precautionary Principle and Its Two Camps of Custom" (2014) 3:2 Transnational Environmental Law at 326.
8. *Canadian Environmental Protection Act*, SC 1999 c 33; *Oceans Act*, SC 1996 c 31; *Species at Risk Act*, SC 2002 c 29.
9. *Kazemi Estate, supra note 3* at 104.
10. *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)* [1969] ICJ Rep 3 at 62.

this requirement. For example, Principle 15 of the *Rio Declaration on Environment and Development* (Rio Declaration), a widely cited alternate to the Bergen Declaration, states:

> [i]n order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[11]

These additional elements of "state capability" and "cost-effectiveness" are incompatible with a uniform application of the principle. These elements are not present in other accepted definitions, meaning that there is no single, accepted statement of the principle. Further, the elements are dependent on a state's national wealth, creating contingencies that prevent the uniformity in application required by international custom.[12]

Uniform state treatment is also undermined by the diversity of environmental legislation. To demonstrate the supposed extensive application of the precautionary principle, advocates and academics often point to the prevalence of the word "precaution" in various statutes.[13] While tempting, such an approach is unjustifiable given the varying contexts in which the term "precaution" occurs. This is especially critical in Canada, where the geography and economy demand robust environmental regulation in a multiplicity of areas. This variety of regulation creates divergent interpretations of the precautionary principle, as terms such as "full scientific certainty," "serious" and "irreversible" take on differing meanings depending on the context in which they are applied. In light of this, it is arguably not possible for the precautionary principle to be applied "virtually uniform[ly]."

**3. Environmental Policy and Decision-Making is a Matter of Administrative Discretion**

In addition to the practical problems with the application of the precautionary principle, it poses a threat to administrative discretion over environmental policy goals. As stated in the second principle of the Rio Declaration, as long as states do not cause damage beyond their national jurisdiction, they have "the sovereign right to exploit their own resources pursuant to their own environmental and development policies."[14] While the Bergen and Rio Declarations specify that the principle can only be invoked in situations where threats rise to the level of "serious or

11. UNESC, *Rio Declaration on Environment and Development*, Principle 15, U.N. Doc. A/Conf. 151/5/Rev. 1 (14 June 1992) [Rio Declaration] (emphasis added).
12. Further, the principle constitutes an impermissible encroachment upon Parliament's established authority over budgetary matters. See *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66 at 114-115.
13. See *Pederson*, supra note 7 at 324.
14. *Rio Declaration, supra note 11*, Principle 2.

irreversible damage," the inherent vagueness of this threshold is highly susceptible to manipulation by particular interest groups.

For example, in *Morton v. Minister of Fisheries and Oceans and Marine Harvest Canada Inc*. the "serious or irreversible damage" threshold appears to have been replaced by a mere "possibility" of harm. The Court stated:

> [t]he evidence, suggests that the disease agent (PVR) may be harmful to the protection and conservation of fish, and therefore a lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.[15]

By invoking the principle where there is an absence of credible scientific evidence supporting a threat of serious or irreversible harm, the risks inherent in all human development activity become ripe for extensive legal challenges. [16]

Ministers also have a high degree of discretion over administrative decisions in environmental law. The precautionary principle ought not to be imposed as an overriding consideration in a minister's decision-making process, particularly at the expense of the relevant statutory language and purpose. In the *Indus Waters Treaty Dispute,* the PCA discussed who should balance various factors in the environmental context. In refusing to apply the precautionary principle, the PCA stated:

> [t]he Court does not consider it appropriate, and certainly not "necessary," for it to adopt a precautionary approach and assume the role of policymaker in determining the balance between acceptable environmental change and other priorities, or to permit environmental considerations to override the balance of other rights and obligations. [17]

Elected Ministers retain discretion to allocate weight to each factor and carry out the balancing process in line with public policy objectives. In the Canadian environmental law context, legislation often mandates consideration of competing factors, such as sustainable development and the promotion of a healthy economy. Thus, unless the precautionary principle is the *sole* guiding principle of a statute, Ministers will be required to balance various factors in reaching their decision. To allow the precautionary principle to override or supersede these factors in their entirety would result in an arguably unreasonable decision and would be subject to being overturned on appeal.

**4. The Current Status of the Precautionary Principle in Canadian Law**

In the absence of explicit statutory reference, emergent international

15. *Morton v. Minister of Fisheries and Oceans and Marine Harvest Canada Inc*., 2015 FC 575 at 45 (emphasis in original).
16. *Supra,* footnote 7.
17. *Supra,* footnote 7.

law principles may be used to interpret domestic law, but only when the statute is unclear or ambiguous. The SCC's seminal decision in *Rizzo & Rizzo Shoes* articulates the starting point of the modern approach to statutory interpretation, which requires "the grammatical and ordinary sense" of statute to be read "harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[18] In *Spraytech*, the SCC clarified that Parliament's intentions are presumed to align with values enshrined in international law, and thus interpretations that reflect these values are preferred.[19]

The principles articulated by the SCC in these two cases make it clear that international law principles are only relevant to the interpretation process when there are competing interpretations, or the legislature's intention is unclear or ambiguous. Accordingly, in *R. v. Kingston*, the Ontario Court of Appeal refrained from applying the precautionary principle in the interpretation process, as the impugned provision, s. 36(3) of the *Fisheries Act*, was clear and unambiguous.[20] To do otherwise contradicts the modern approach to statutory interpretation and is an affront to legislative intent.

**5. Conclusion**

National sovereignty is a fundamental pillar of the Canadian *Constitution*, and potential intrusions must not be treated lightly. The only justifiable infringement upon a state's legislative autonomy is firmly established customary international law.[21] While Canadian courts have acknowledged the existence of the precautionary principle, they have generally avoided comment on the rule's legal status in domestic law. No decision has solely hinged on the application of the principle; rather, courts have considered whether their decisions are consistent with the rule. In the writers' view, reliance upon, and reference to, the precautionary principle, whose status remains dubious, ought not to become a ground for infringement of fundamental constitutional principles.

**RESORT TO THE PRECAUTIONARY PRINCIPLE SHOULD BE LIMITED.**

18. *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 2 at 21, quoting Driedger in *Construction of Statutes* (2nd ed. 1983).
19. *Spraytech, supra* note 1 at 30-31; While the court in Spraytech justified their decision to utilize international law in statutory interpretation based on their reasoning in *Baker*, it is worth noting that *Baker* spoke specifically to international human rights law, not international law in general. Turning to international human rights law was justified on the basis of similar use by other common law countries and integral importance to the *Charter of Rights and Freedoms*. By applying the precautionary principle, *Spraytech* arguably departs from *Baker* and enables use of general international law for interpretation of ambiguous statute. Respectfully, such departure lacks accompanying justification.
20. *R. v. Kingston*, [2004] OJ No 1940 (QL) at 86.
21. *R. v. Hape*, supra note 3 at 43.

# Environmental Law

*Aidan Cameron, Kate Macdonald, Jack Ruttle and Bianca Déprés*

## *RESSOURCES STRATECO INC. C. PROCUREURE GÉNÉRALE DU QUÉBEC*, 2017 QCCS 2679

In this decision, the Superior Court of Québec dismissed Ressources Strateco inc.'s claim against the Attorney General of Québec for alleged loss of investment in the Matoush uranium project.

After having acquired mining claims in the Otish Mountains and confirming the potential for uranium in the region, Strateco set its sights on developing the Matoush uranium project. The project is situated on lands covered by the James Bay and Northern Québec Agreement, a treaty signed in 1975 between Aboriginal communities, Quebec, and Canada, and sits at the heart of the traditional territory of the Cree Nation. The project is subject to various provincial and federal approval requirements. The Québec government delayed its approvals based on concerns raised by Cree communities in the region. Eventually, the provincial Minister of Sustainable Development, Environment, and Parks and Wildlife announced a province-wide, temporary ban on exploration and extraction projects involving uranium, and refused to issue a certificate of authorization permitting Strateco to perform advanced-stage subsurface exploration, citing a lack of social acceptability for the project.

Strateco commenced a claim against the provincial government for nearly C$200 million in damages, including punitive damages. It argued that Québec had encouraged Strateco to invest in the project, associating the project with Québec's Plan Nord strategy, only to impose a moratorium and refuse to issue the certificate.

In dismissing Strateco's claim, the Court made three key findings. First, it was open to the Minister to consider "social acceptability" in making his decision. Although the *Québec Environmental Quality Act* (Act) did not expressly mention "social acceptability," this concept was a factor to be considered in making his decision, as it encompassed the principles underlying the Act. Second, it could not be said that the Minister acted in bad faith in refusing to issue the certificate. The Minister enjoyed broad discretion to weigh various factors in deciding whether to issue a certificate. Third, the Court rejected Strateco's assertion that the Minister's decision to impose a moratorium and to refuse to issue a certificate amounted to a *de facto* expropriation of Strateco's mining claims. Strateco's mining claims did not confer property rights. Rather, they conferred the right to explore for mineral substances in the region covered by the claims. The claims did not guarantee that Strateco would be granted the authorizations necessary to carry out advanced-stage subsurface

exploration, and Strateco commenced the project fully aware of the risks associated with mining exploration. Accordingly, the claim was dismissed.

## *YUKON V. BYG NATURAL RESOURCES INC.*, 2017 YKSC 2

This decision arose out of the environmental disaster that followed BYG Natural Resources' abandonment of a mine property it owned in the Mount Nansen area in Yukon. BYG abandoned the mine after being convicted of regulatory offences for actions described by the Yukon Territorial Court as "raping and pillaging" the resources of Yukon. The land was left contaminated with arsenic and heavy metals. BYG went bankrupt. The receiver in bankruptcy sought an order approving its Proposal Solicitation Procedure (PSP), which set out what, in essence, would be a government subsidized remediation project.

The Yukon Supreme Court approved the PSP, based on the support it received from Yukon, Canada and an affected First Nation, as well as the lack of viable alternatives to address the environmental disaster. However, the Court took the opportunity to express its strong disappointment with what had occurred, noting that this case should serve as a wakeup call to future governments of Yukon and Canada, and the taxpayers who will pay the millions of dollars required to remediate the BYG mine property.

For more on this decision, see "*Managing the Environmental Legacies of Mining Projects: Key Concepts and Trends in Reclamation Security*" on page 44.

# Managing the Environmental Legacies of Mining Projects: Key Concepts and Trends in Reclamation Security

*Selina Lee-Andersen and Connor Bildfell*

The "polluter pays" principle (PPP), which was first articulated in 1972 by the Council of the Organisation for Economic Co-operation and Development (OECD), stands for the proposition that the polluter should bear the costs of any pollution or environmental damage it causes, rather than government or society. Since it was first articulated, the PPP has been adopted in both domestic and international environmental law and it underpins many modern environmental regulations governing land, water and air.

Within the mining context, there is no mechanism which better embodies the PPP than reclamation security. As part of the lifecycle of a mine, reclamation security is used in many jurisdictions to ensure that disturbed land will be restored to an environmentally sound and productive state after mine closure. With reclamation security, regulators are looking to ensure that sufficient funds are available to cover mine closure costs in the event the responsible company is financially or otherwise unable to complete the closure as planned due to events such as bankruptcy or corporate dissolution. While conceptually simple, reclamation security tends to be quite complex in reality, and policies and practices can vary considerably by jurisdiction. This article explores the policy drivers for reclamation security and provides an overview of key elements of reclamation security programs, as well as trends to watch for.

## What is Reclamation Security?

Reclamation security generally refers to a financial amount that is deposited or pledged to guarantee the performance of a mining company's obligations to restore a mining site to an environmentally sound and productive state, which sum is to be forfeited in case of default. Reclamation security forms an integral part of the permitting process, which typically spans the full lifecycle of a mine. As part of the mine permitting process, regulators will usually require the preparation of a reclamation plan, which may address surface reclamation, removal of mining infrastructure and facilities, stabilization of mine wastes to prevent contamination of the surrounding environment, monitoring and other long-term requirements (e.g. water treatment obligations) to return the mining site to a stable state. Generally speaking, once reclamation work is completed to the regulator's satisfaction and there are no longer any ongoing maintenance or monitoring requirements, the security will be released to the company. However, where a company is unable to meet its reclamation obligations for financial or other reasons, the security will be forfeited and allocated to the costs of reclamation.

A survey of reclamation security programs in Canadian[1] and international mining jurisdictions shows that each jurisdiction takes a unique approach, in particular as it relates to developing liability estimates and establishing the types and amounts of financial security required. This is because the nature of mineral resources and environmental issues vary across each jurisdiction. However, many of the challenges faced by regulators are common across jurisdictions. For example, regulators must accurately assess an appropriate level of financial security to cover reclamation costs in the event that a company defaults on its obligations, thus ensuring that taxpayers are not on the hook for such costs. The challenge is that reclamation liabilities must be calculated decades into the future using predictive models, which often results in a significant amount of uncertainty that can only be mitigated with periodic reviews. In addition, there are certain environmental issues that might be unknown at the time of assessment. As technology and public expectations evolve, government regulations must be adaptable enough to reflect new science and information.

## Policy Drivers for Reclamation Security

In the absence of reclamation security, taxpayers bear the risk of default on the proponent's site reclamation obligations. In the event that taxpayers end up on the hook for reclamation costs, the consequences can be

1. In Canada, mining activities are regulated primarily at the provincial and territorial level. The federal government enacted statutes and regulations that govern mine closure activities on federal lands, and the federal government is responsible for administering mine reclamation and closure in Nunavut, the Northwest Territories and on First Nation reserve lands (the Yukon has implemented its own *Mine Site Reclamation and Closure Policy*).

significant. For example, in *Yukon v. B.Y.G. Natural Resources Inc.*,[2] the Yukon Supreme Court approved a plan for soliciting proposals for the acquisition of the remaining assets of B.Y.G. Natural Resources Inc. (BYG) and remediation of the BYG mining property in the Mount Nansen area of Yukon, following BYG's bankruptcy. BYG had abdicated its reclamation responsibilities to the governments of Canada and Yukon.[3] The Court emphasized the devastating financial consequences for Canadian taxpayers:

> [A]n account of BYG's historical activity in the Yukon should be brought to the attention of the federal and territorial taxpayers who remain fiscally responsible for remediation efforts associated with the contaminated site. …The point to be made is that the BYG disaster could happen again and the Yukon … will be liable for the costs of the environmental cleanup. This case should be a wake-up call.[4]

The Court concluded:

> Although it is fair to say that there have been substantial changes to the mining approval and monitoring regime since BYG was granted the right to operate in the Territory in the late 1990's, this case stands as a painful reminder of the lasting and egregious damage that unscrupulous and unchecked profiteering can bring about in the mining sector. It is an embarrassment to Canada, Yukon and the responsible mining community. It is the hope of this court that this case will provide a valuable lesson to future governments of Yukon and Canada, and the taxpayers who will pay the millions of dollars required to remediate the BYG mine property.[5]

Another example of the dangers of not requiring remediation security is the abandonment of the Faro lead-zinc mine in 1998, a site described as a "toxic blight," with an estimated lifetime reclamation cost of C$1 billion, which will fall on the shoulders of Canadian taxpayers.[6] Such an outcome is precisely what reclamation security seeks to avoid.

## Overview of Reclamation Security Requirements

The types of security accepted by authorities vary somewhat by jurisdiction, though in substance the types of acceptable security remain relatively consistent. In British Columbia, for example, subject to the discretion of the Chief Inspector of Mines, acceptable forms of security include guaranteed investment securities certificates (for security less than C$25,000), irrevocable standby letters of credit, reclamation surety

2. 2017 YKSC 2.
3. *Ibid* at para. 8.
4. *Ibid* at paras. 10, 13.
5. *Ibid* at para. 37.
6. *Ibid* at para. 8.

bonds, cash and cash equivalents.[7] Similarly, with respect to quartz mining in Yukon, the acceptable forms of security include cash, promissory notes, certified cheques, bank drafts, bonds, irrevocable letters of credit, surety bonds, and any other form of security found to be acceptable.[8] Authorities generally require that the form of security be liquid, reliable and stable in value — in short, the security required tends to be "hard security." "Softer" forms of security, such as parent company guarantees and pledges of assets, tend to be less readily accepted.

## Determining the Amount of Security Required

The task of determining the appropriate amount of security is both complex and difficult. To accurately determine the appropriate amount of security, a clear sense of the potential liability that the security is intended to cover is necessary, because security and liability are intimately connected. Yet, estimating the potential liability facing a company at the end of a mine's lifecycle, which may be decades into the future, can be fraught. Any number of events may intervene to either increase or decrease that liability. The security/liability balancing process is thus a delicate one. Further, there is a tension between (a) ensuring the company posts adequate security, and (b) imposing excessive financial burdens on the company.

**ESTIMATING LIABILITY TO END OF MINE LIFE CYCLE PRESENTS CHALLENGES.**

Approaches to determining security requirements vary by jurisdiction, though there is generally some element of discretion. In B.C., for example, security requirements are determined pursuant to a risk-based approach and calculated on a case-by-case basis. The Chief Inspector is given discretion to determine the amount of security, if any, that is appropriate in the circumstances. Any number of factors may enter into this analysis, including the financial strength of the proponent, the proponent's history of compliance with environmental regulations, the estimated reclamation costs, and the stage of development in the mine's lifecycle. Where deemed appropriate, the Chief Inspector may require less than full security.[9] B.C.'s approach recognizes that there is no "one-size-fits-all" solution to determining the appropriate amount of security, as each project is unique.

Project proponents in Ontario that pass a financial strength test may

7. Government of British Columbia, "Securities", online: <https://www2.gov.bc.ca/gov/content/industry/mineral-exploration-mining/permitting/reclamation-closure/securities> ["Securities"].
8. *Quartz Mining Act*, O.I.C. 2007/77, s. 2.
9. Government of British Columbia, Ministry of Energy and Mines, "Factsheet: Mine Reclamation Security in British Columbia" (18 November 2016), online: <https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/mineral-exploration-mining/documents/reclamation-and-closure/fs_mine_reclamation_security_in_bc_nov_18_2016.pdf> ["Factsheet"].

have part or all of their reclamation security requirements waived. In Nova Scotia, reclamation security amounts are set to match the total estimated reclamation cost at peak disturbance; this security is required only to cover prescribed items in legislation and to be satisfactory to the Minister.

Responsible authorities continually review and, where appropriate, adjust the security arrangements in place with mining companies in order to ensure changes in the company, the project and the broader operational context are reflected in the arrangement. In B.C., for example, mine permits are generally reviewed every five years, and at that time estimated liability is recalculated and the reclamation security adjusted as appropriate.[10] Further, the Chief Inspector has discretion to adjust the amount of security at any time as deemed appropriate.[11]

Consistent with this notion of ongoing review and adjustment, reclamation security requirements may be reduced over time based on progressive reclamation (i.e. reclamation carried out during the operation phase). This prospect gives mining companies a strong incentive to reclaim the site over time, thereby lowering the amount of security required.

## Reclamation Security Approaches Outside Canada

Outside Canada, mining jurisdictions in Australia and the U.S. have implemented a diverse range of reclamation security requirements. In a number of Australian states, financial security requirements are assessed on a case-by-case basis. The state of Western Australia has taken a different approach than most other jurisdictions — rather than being required to post financial security in an amount sufficient to cover 100% of the estimated mine reclamation and closure costs, mining companies in Western Australia are required to make an annual payment into the Mine Rehabilitation Fund (MRF). As a requirement of the MRF, all tenement holders must provide the regulator with accurate information about the types and areas of ground disturbance for each tenement, which data is used to calculate the annual MRF levy. The MRF Rehabilitation Liability Estimate Calculator[12] provides a liability estimate based on the level and type of disturbance and the amount of rehabilitation that has been conducted on a tenement. It is possible to reduce the amount of the MRF levy through progressive rehabilitation of disturbances on the tenement.

A number of U.S. states also have reclamation security requirements. Alaska and Nevada require reclamation security sufficient to pay 100% of estimated mine reclamation and closure costs. These requirements

10. Stantec Consulting Ltd., *Policy and Process Review for Mine Reclamation Security* (September 2016) at 2.1, online: <https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/mineral-exploration-mining/documents/reclamation-and-closure/stantec_report_mine_reclamation_security_sept_30_2016.pdf>.
11. "Securities", *supra* note 7.
12. Online: <https://ace.dmp.wa.gov.au/ACE/Public/MrfRleCalculator/RleCalculator>.

are reviewed periodically and reductions may be made where mining companies perform reclamation activities concurrently with ongoing mining operations.

## Looking Ahead — Trends to Watch for

Over the next few years, stakeholders will likely see changes to reclamation security requirements as policy approaches continue to evolve. In B.C., the government launched a review of its reclamation security policies in December 2016 and committed to completing this review by the end of 2018.[13] The government will be considering, among other materials, a series of recommendations issued by Ernst & Young in February 2017 concerning potential improvements to B.C.'s reclamation security policies.[14] Based on these recommendations and depending on whether and to what extent the provincial NDP government (which came into power in July 2017) carries forward the previous government's commitment, stakeholders may see the B.C. government formalizing new and existing practices relating to reclamation security, including the method for calculating the amount of security required and the factors to be considered in that determination. Other jurisdictions will also likely take steps to ensure their reclamation security policies and practices are clear, consistent and transparent.

**THERE IS OFTEN A CONSIDERABLE GAP BETWEEN SECURITY HELD AND DOLLARS REQUIRED.**

Another trend stakeholders will likely see is increasing security requirements, continuing the current pattern. In B.C., the statistics reveal growth in the total value of reclamation security held in B.C. since the 1980s. The B.C. government held only C$10 million in reclamation security in 1984;[15] by the end of 2015, that number had swelled to more than C$1 billion.[16] Between 2011 and 2016 alone, the amount of reclamation security held in B.C. nearly doubled.[17] Further, as of 2015, an additional C$846 million in security was scheduled to be deposited with the province by 2023.[18] But while total security holdings have grown over the years, there remains a considerable gap between total security held and total

13. "Securities", *supra* note 7.
14. Ernst & Young LLP, *EY Report & Recommendations for BC's Mine Reclamation Financial Security Policy* (February 2017), online: <https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/mineral-exploration-mining/documents/reclamation-and-closure/bc_mem_ey_report_on_mine_reclamation_security_final.pdf>.
15. *Government of British Columbia, Ministry of Energy and Mines, 2015 Annual Report of the Chief Inspector of Mines*, at 34, online: <https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/mineral-exploration-mining/documents/health-and-safety/2015_ci_annual_rpt.pdf> [2015 Annual Report].
16. *Ibid*.
17. "Factsheet", *supra* note 9.
18. *2015 Annual Report*, *supra* note 15 at 34.

estimated reclamation costs. In B.C., for example, there was a C$1.27 billion shortfall in 2015 between the security posted and the estimated liability of mining companies.[19] This gap was highlighted in a May 2016 report of the B.C. Auditor General, which was highly critical of the province's regulatory compliance and enforcement activities pertaining to mining.[20] The Auditor General cited the aftermath of the Britannia Mine closure as an example of what can happen when adequate remediation security is not required. Taxpayers have been on the hook for an estimated C$46 million to remediate the site, including costs of installing a water treatment plant that has an operating cost of more than C$3 million per year.[21] Audits performed in other Canadian provinces also identify insufficient security as an issue to be addressed.[22]

Reclamation security is a rapidly evolving concept that raises nuanced business, legal and environmental issues. However, there is no doubt that reclamation security is an integral part of the mine permitting framework. Going forward, stakeholders can expect calls for greater accountability from shareholders, members of the public and governments to ensure that reclamation obligations are satisfied. As a result, reclamation security will continue to serve as a key policy instrument to enhance public confidence in the mining industry, meant to assure taxpayers that they will not be left to pick up the tab for the clean up of abandoned mines.

19. *Ibid* at 39.

20. Auditor General of BC, *An Audit of Compliance and Enforcement of the Mining Sector* (May 2016), online: <http://www.bcauditor.com/sites/default/files/publications/reports/OAGBC%20Mining%20Report%20FINAL.pdf>.

21. *Ibid*.

22. "Securities", *supra* note 7.

Case Law Summaries

# Expropriation

*Aidan Cameron, Kate Macdonald and Jack Ruttle*

## *1520658 ONTARIO INC. V. HER MAJESTY THE QUEEN,* 2017 ONSC 4141

In this decision, the Ontario Superior Court of Justice determined that a mining claim is not an equitable interest in land under the Ontario *Expropriations Act*.

The plaintiff staked three mining claims on Crown land containing quality aggregate. Ontario planned to build a highway through the property. By the time the plaintiff staked its claims, Ontario had already completed survey work, cut a centre line swath for the highway, and conducted geotechnical testing. The lands were withdrawn from staking. Years later, the Ministry of Natural Resources issued permits to the plaintiff allowing it to mine aggregate from the property. Because of the presence of the highway, however, the amount of aggregate that could be profitably mined was small. The plaintiff brought an action claiming that Ontario had effectively expropriated the property.

**A MINING CLAIM IS NOT "LAND" FOR EXPROPRIATION PURPOSES.**

The Court dismissed the action. The holder of a mining claim is a mere licensee of the Crown, and the staking of a claim confers no right to exclude others from the land. A mining claim is not "land" under the *Expropriations Act;* rather, it is a right to proceed with assessment work. Importantly, the Court found that the plaintiff never actually intended to mine the property and was aware of the plan to build a highway before staking its claim. In the Court's view, the plaintiff's aim in staking its claim and applying for a permit was not to operate an aggregate mine, but rather to obtain compensation from Ontario once the highway was built.

For more on this decision, see McCarthy Tétrault LLP's *Mining Prospects* blog post entitled "A Mining Claim is not an 'Interest in Land' – Ontario Court Dismisses Expropriation Claim."

# Workplace Drug and Alcohol Policies: Recent Decisions Impacting Mining Employers

*Justine Lindner*[1]

This past year we have seen a number of interesting cases with the potential to impact the practices of Canadian mining employers.

This article summarizes two recent appellate decisions regarding workplace drug and alcohol policies that provide guidance to mining employers for evaluating and updating their drug and alcohol policies. The first addresses a policy requiring employees to self-report drug or alcohol addiction. The second addresses the implementation of randomized drug and alcohol testing. Drug and alcohol policies often form an important component of a health and safety program for safety-sensitive workplaces. They should be regularly reviewed to ensure that they remain compliant with changing Canadian law and take into account technological and scientific advances respecting testing methodologies and the medical community's understanding of the impact and side effects of substances.

## *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30

It is well established in human rights jurisprudence that a dependency on drug or alcohol is a disability. *Prima facie* discrimination will likely be established where an employee is dismissed because of their addiction.


1. Special thanks to Simon Cameron for his assistance with the preparation of this article.

In general, employers are obligated to accommodate employees with disabilities to the point of undue hardship. Even where there are potentially significant health and safety issues, the threshold of the "point of undue hardship" is high and may not be made out unless the employer can demonstrate exceptional circumstances.

In *Stewart*, the Supreme Court of Canada (SCC) determined that the employer, Elk Valley Coal Corp., had not discriminated against a former employee, Stewart, who was dismissed after testing positive for cocaine following a workplace accident.

The SCC upheld the Alberta Court of Appeal and an Alberta Human Rights Commission Tribunal finding that Stewart did not make out a *prima facie* case of discrimination.[2] A key aspect of the SCC's reasoning was that the employer had implemented an Alcohol, Illegal Drugs & Medication Policy. The policy required employees to self-report a problem with addiction; if they did so, they were offered the opportunity to obtain treatment. However, employees who did not come forward to disclose such an issue, and who then subsequently tested positive for drugs or alcohol following an accident, would be terminated from employment. This policy was also identified as the "no-free-accident" rule.[3]

Stewart was terminated from employment after testing positive for cocaine following a workplace accident involving the loader that he was driving. After the accident, Stewart revealed to the employer that he thought he was addicted to cocaine.

Before the Tribunal, Stewart argued that he had been discriminated against on the basis of a disability, being his cocaine addiction. The employer's position was that Stewart was dismissed for his failure to follow the policy, and not for a discriminatory reason.

The Tribunal agreed with the employer that there was no *prima facie* discrimination because Stewart's addiction was not a factor in his termination from employment. The Tribunal found that Stewart had been terminated from employment for his failure to abide by the policy and that his ability to comply with the policy by self-disclosing his addiction meant that he could not demonstrate that he was adversely impacted by the policy.[4] Significantly, the Tribunal rejected Stewart's evidence that a symptom of his addiction was denial, such that self-reporting in accordance with the policy was impossible for him, instead concluding that the expert evidence demonstrated that his addiction did not diminish his capacity to comply with the terms of the policy.[5]

2. *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30, at para. 5 (*Stewart*).
3. *Stewart*, at para. 1.
4. *Stewart*, at para. 26.
5. *Stewart*, at para. 34.

At the SCC, the majority held that the Tribunal's decision that Stewart had not made out a *prima facie* case of discrimination was reasonable. The employer's position that Stewart was terminated for failing to comply with the Policy, and not for any discriminatory reason, was supported by Stewart's termination letter.[6]

The SCC noted, however, that whether an addiction makes self-reporting impossible must be determined on a case-by-case basis, because in some cases "the addiction may effectively deprive a person of the capacity to comply, and the breach of the rule will be inextricably connected with the addiction."[7] Given this warning, employers should not presume that the failure to comply with a drug and alcohol self-reporting policy will always provide grounds for termination. Each case will be dependent on the applicable medical evidence.

**FAILURE TO COMPLY WITH SELF-REPORTING OBLIGATION IS NOT ALWAYS GROUND FOR TERMINATION.**

Nonetheless, this decision provides an example of the circumstances in which an employer may be in a lawful position to dismiss an employee who has a drug or alcohol addiction without failing to meet its obligations under human rights legislation. The employee was terminated from employment for breaching a workplace policy, and not simply because of drug use or addiction. The decision highlights the importance of workplace polices on safety, which include policies on drugs and alcohol.

## *Suncor Energy Inc. v. Unifor Local 707A*, 2017 ABCA 313

Following the SCC's decision in *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*,[8] there been an open question as to the circumstances in which randomized drug and alcohol testing will be justified such that they will be upheld by adjudicators.

In general, adjudicators considering whether to uphold a drug and alcohol testing policy will assess and determine whether an employer's need for the policy outweighs the harmful impact its implementation will have on employees' privacy rights. In *Irving,* Justice Abella, writing for the majority, indicated that a randomized testing policy would be acceptable where, in addition to the policy applying to employees engaged in highly safety-sensitive work, there was "evidence of enhanced safety risks, such as evidence of a general problem with substance abuse in the workplace."[9] A series of recent Alberta decisions provides insight into the types of

6. *Stewart*, at paras. 28-33.
7. *Stewart*, at para. 39.
8. 2013 SCC 34 (*Irving*).
9. *Irving*, at para. 31.

circumstances required to justify a randomized testing policy.

One of those decisions is *Suncor Energy Inc. v. Unifor Local 707A*. In 2012, Suncor Energy, the employer, implemented a randomized drug and alcohol testing policy for safety-sensitive positions at some of the sites at its Fort McMurray operations.[10] Prior to implementing the policy, the employer had implemented a series of lesser measures designed to address workplace drug and alcohol use, including employee education and training, an employee assistance program, a treatment program for employees with substance dependencies, and sniffer dogs.[11] Despite these efforts, the employer took the position that the addiction problems at the site demonstrated "a pervasive problem that is unparalleled in any case in Canada."[12] This included over 2,200 drug and alcohol related incidents, including three fatalities, in a nine-year period.[13] Notably, in *Irving*, in which the random testing policy was not upheld, the employer relied on eight documented alcohol-related incidents over a 15-year period.[14]

Unifor Local 707A (the Union) grieved the employer's implementation of the policy. The majority of the Alberta Labour Relations Board upheld the Union's grievance. The Board found that the employer's allegations of a pervasive substance abuse problem were "unparticularized and unrefined," and concluded that the employer had not demonstrated sufficient safety concerns within the bargaining unit to justify random testing.[15]

**RANDOM DRUG AND ALCOHOL TESTING POLICIES ARE ONLY JUSTIFIABLE IN EXCEPTIONAL CIRCUMSTANCES.**

Suncor sought judicial review of the Board's decision. The Alberta Court of Queen's Bench ordered the Board's decision quashed because it: (1) misapplied the balancing exercise of the employer's need to ensure safety against privacy interests as outlined in *Irving;* (2) only considered evidence that demonstrated substance abuse problems *within* the bargaining unit, ignoring the evidence of problems in the wider workplace; and (3) failed to consider all the relevant evidence. The Court ordered that the matter be sent back for a fresh hearing by a new panel.[16]

10. *Suncor Energy Inc. v. Unifor Local 707A*, 2017 ABCA 313 at para. 2 (*Suncor 2017*).
11. *Suncor 2017*, at para. 11.
12. *Suncor 2017*, at para. 14.
13. *Unifor, Local 707A v. Suncor Energy Inc.*, 2014 CanLII 23034 (AB GAA) at paras. 37 and 53 (*Suncor 2014*).
14. *Suncor 2017*, at paras. 13 & 47.
15. *Suncor 2017*, at paras. 16 &19; see also *Suncor 2014* at paras. 253, 266 & 271.
16. *Suncor 2017*, at paras. 21-22.

The Union appealed the decision to quash to the Alberta Court of Appeal. In its decision, the Court of Appeal upheld the Queen's Bench's decision, concluding in part that the Board had unreasonably ignored evidence of substance abuse in the broader workplace. By requiring the employer to adduce evidence particularized to members of the bargaining unit, the Board had set the *Irving* threshold of the employer having to demonstrate evidence of enhanced safety risks too high. The Court of Appeal concluded that the *Irving* test "calls for a more holistic inquiry into drug and alcohol problems within the workplace generally, instead of demanding evidence unique to the workers who will be directly affected by the arbitration decision".[17]

The Union has filed an application seeking leave to appeal to the SCC. In light of this, we may see the SCC provide its view on this case in the next year or so. Nonetheless, the decision of the Alberta Court of Appeal is significant for employers, as it provides guidance regarding the scope of the evidence relevant to the application of the *Irving* test and some indication as to the types of exceptional circumstances in which a random testing policy may be justified. These decisions underscore the importance of thorough documentation of drug and alcohol problems in the workplace and for employers to take into account the full scope of the issues it can demonstrate prior to implementing random testing in the event the policy is challenged.

17. *Suncor 2017*, at para. 46.

Case Law Summaries

# Labour and Employment

*Aidan Cameron, Kate Macdonald and Jack Ruttle*

## *RED CHRIS DEVELOPMENT COMPANY LTD. V. UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL,* 2017 CANLII 75758 (BC LRB)

In this decision, the British Columbia Labour Relations Board held that a mining company was not entitled to demand that union representatives undergo drug and alcohol testing before accessing the employer's operation for the purpose of organizing employees.


Red Chris Development Company Ltd., in connection with its mine south of Dease Lake, B.C., operates a live-in camp that accommodates many of its employees. The union applied for an order granting it access to the camp for the purpose of organizing. The parties agreed to the terms on which access would be granted and entered a settlement agreement. Red Chris maintained that its camp orientation package required all visitors to the camp to undergo drug and alcohol testing. Red Chris said it had provided this orientation package to the union, but acknowledged that drug and alcohol testing was not discussed during the settlement negotiations.

The Labour Relations Board found that although Red Chris had in place a drug and alcohol testing policy, that policy had not been in the parties' contemplation when they agreed to the terms of the union's access to the camp. Moreover, the Board did not accept that the documents contained in the orientation package, read individually or in combination, established a policy whereby visitors were required to undergo drug and alcohol testing before access would be granted.

## *STEWART V. ELK VALLEY COAL CORP,* 2017 SCC 30

In this decision, a majority of the Supreme Court of Canada held that an Alberta coal company's termination of an employee for breaching its drug and alcohol policy was not discrimination under the *Alberta Human Rights Code*.

For more on this decision, see *"Workplace Drug and Alcohol Policies: Recent Decisions Impacting Mining Employers"* on page 52. See also

McCarthy Tétrault LLP's *British Columbia Employer Advisor* blog post entitled "Supreme Court of Canada upholds dismissal of employee for failing to disclose cocaine use in violation of 'No Free Accident Rule'."

## *UNIFOR, LOCAL 707A V. SUNCOR ENERGY INC.*, 2017 ABQB 752 AND 2017 ABCA 313

In this decision, the Alberta Court of Queen's Bench granted an interim injunction prohibiting an employer from implementing a workplace drug and alcohol testing policy applicable to employees in safety-sensitive positions at a mining site in northern Alberta.

After the employer, Suncor Energy Inc., announced the policy, the union filed a grievance and obtained a first interim injunction prohibiting Suncor from implementing the policy. The grievance led to an arbitration award in favour of the union, but this award was set aside by the Alberta Court of Queen's Bench, whose decision was then confirmed by the Court of Appeal. The union sought leave to appeal to the Supreme Court of Canada, and applied for a second interim injunction to prevent Suncor from implementing the policy in the meantime.

For more on this decision, see *"Workplace Drug and Alcohol Policies: Recent Decisions Impacting Mining Employers"* on page 52.

## *UNITED STEELWORKERS, LOCAL 7085 (HACHÉ & HARVEY) V. BRUNSWICK SMELTER, GLENCORE CANADA CORPORATION*, 2017 CANLII 20338 (NB LA)

In this case, a New Brunswick labour arbitrator held that the dismissals of two mentally disabled smelter employees were not discriminatory because the dismissals arose out of *bona fide* occupational requirements.

The grievors were former employees of Brunswick Smelter, owned by Glencore Canada Corporation. At the time of their dismissal, both were permanently disabled and incapable of continuing gainful employment at the smelter. The arbitrator, applying the three-part bona fide occupational requirement test, held that the grievors were not unjustly dismissed. First, the standard of attendance at the workplace adopted by Glencore was rationally connected to performance of the job. Second, Glencore had acted in good faith, and had not laid off the employees, as the union suggested, to save costs. Finally, both grievors were totally and permanently disabled and unable to perform their duties, and no reasonable accommodation would enable them to return to work.

# Municipal Law

*Aidan Cameron, Kate Macdonald and Jack Ruttle*

## *COWICHAN VALLEY (REGIONAL DISTRICT) V. COBBLE HILL HOLDINGS LTD.*, 2017 BCCA 176

The British Columbia Court of Appeal has issued supplementary reasons to its earlier decision, discussed in *Mining in the Courts,* Vol. VII.

In the earlier decision, the quarry owner and the quarry's former and current operators successfully appealed orders and declarations granted to the Cowichan Valley Regional District (CVRD) that enjoined them from backfilling the quarry with imported contaminated soil, encapsulated in engineered cells. CVRD unsuccessfully cross-appealed the order dismissing its application to have the contaminated soil and a soil treatment facility, which had been built but was not operating, removed from the land.

In these supplementary reasons, the Court of Appeal awarded costs to the appellants. The quarry owner and the former quarry operator (collectively referred to as Cobble) were awarded increased costs. The Court's reasons for this exceptional remedy were that: (i) the litigation was complex; (ii) the case's importance transcended the interests of the parties and impacted the mining industry as a whole; (iii) the CVRD's claim was doomed to fail, and it took an excessive amount of time to be resolved; and (iv) ordinary costs would be substantially disproportionate to Cobble's actual costs. The Court noted that the appellants "paid a heavy price for the complex litigation, which was commenced by a state actor to address an issue that could only have been effectively resolved at the political level" or at the Environmental Appeal Board. The current quarry operator, meanwhile, was awarded ordinary costs, as it had requested.

## *COYNE V. WHITEHORSE (CITY)*, 2017 YKSC 57

In this case, the Yukon Supreme Court considered subsurface mining rights and confirmed that the City of Whitehorse (City) was permitted, under the *Municipal Act,* to prohibit mining by way of a zoning bylaw.

H. Coyne & Sons Limited owned a subsurface mineral interest in two

subsurface parcels in Whitehorse. Part of the surface area, Lot 1280, was transferred to a development company. Pursuant to the City's 2010 official community plan, 2012 zoning bylaw, and a subdivision application approval, the development company was permitted to construct a rural residential development on the lot and subdivide the land. The development company then denied Coyne access to the surface of the lot for exploration and mining activities. Coyne commenced an action in the Yukon Supreme Court seeking declaratory relief that would give Coyne rights of access.

The Court found that Coyne's mineral rights carried with them an ancillary and necessarily implied right to access the surface of the developer's land. However, the Court found that Coyne's ancillary right of access was not absolute; rather, it was subject to legislative requirements including security and compensation for damage, statutory approvals, and, before the right could be enjoyed, Coyne would have to convince the municipality to amend the 2010 official community plan and 2012 zoning bylaw, which did not permit mining on the surface above Coyne's subsurface mineral interest. The Court therefore declined to make a declaration in respect of Coyne's right to access the surface of the lot or to restrain the development company from preventing access, on the basis these other requirements restraining Coyne's rights had to be dealt with first and were not within the Court's power to determine.

The Court went on to find that the City had authority under the Yukon *Municipal Act* to pass bylaws that prohibited uses such as exploration and mining, and that the 2010 official community plan, 2012 zoning bylaw and approval of the subdivision of the lot were validly adopted or enacted instruments consistent with the City's jurisdiction in planning and zoning regulation. The Court concluded that while the City's official community plan and zoning bylaw resulted in additional regulatory procedures that Coyne had to follow, the indirect prohibitions did not amount to an unacceptable impairment.

## *ROCK SOLID HOLDINGS INC. V. LAKEHEAD RURAL PLANNING ET AL, 2017 ONSC 6564*

In this case, the Ontario Superior Court of Justice considered the non-conforming use doctrine in the context of an extraction company's application to a land use planning board for a permit to conduct aggregate extraction. The doctrine, set out in the Ontario *Planning Act*, provides an exemption for legal non-conforming uses from the effect of zoning under the legislation.

Rock Solid Holdings Inc. owned two adjacent lots — Lots 17 and 18 — in the Township of Gorham, both of which it used for aggregate extraction. Gorham had no municipal government, so planning authority devolved to the Lakehead Rural Planning Board. Rock Solid sought to obtain a permit to

carry out aggregate extraction on Lot 17, which required it to prove that no zoning bylaw prohibited making, establishing or operating pits and quarries on the lot. While the applicable zoning classification permitted aggregate extraction on Lot 18, the Board's position was that Lot 17 was subject to Rural zoning, which does not permit aggregate extraction.

The Court held that the test for establishing a non-conforming use had been met, noting evidence of some level of aggregate extraction on Lot 17 before a regulation was passed to prohibit that use, and that the pit situated on Lot 17 had been used intermittently. The Court then applied the principle that where lands adjacent to a quarry operation are held by a common owner for the purpose of future expansion of a quarry, there is no reason to draw a boundary between the adjacent lands. Finally, the Court rejected the Board's argument that the aggregate extraction activities would result in an intensification in use that would negate the application of the non-conforming use doctrine. Lot 17 was thus not precluded by zoning regulations from being used for the making, establishment, or operation of pits and quarries.

# Securities & Shareholder Disputes

*Aidan Cameron, Kate Macdonald and Jack Ruttle*

## *HARRINGTON GLOBAL OPPORTUNITIES FUND LTD. V. ECO ORO MINERALS CORP.*, 2017 BCSC 664, 2017 BCSC 669 AND 2017 BCCA 224

In this decision, the British Columbia Supreme Court refused to set aside a Canadian mining company's issuance of new shares on the basis that the issuance was oppressive.

In need of capital, Eco Oro Minerals Corp. entered into investment agreements with the other respondents whereby each respondent was issued convertible debt instruments. The petitioners then purchased shares in Eco. After Eco's share price increased significantly, Eco decided to convert the debt instruments into shares, resulting in the issuance of new shares. The conversion occurred shortly before a scheduled shareholders' meeting called for the purpose of attempting to remove and replace Eco's board. The petitioners sought to have the issuance of new shares set aside on the basis of oppression.

The Court dismissed the oppression claim. There was no evidence that converting the debt instruments into shares was not in Eco's best interests. Such an action was permitted under the investment agreements, and the petitioners purchased shares in Eco knowing that the conversion was possible at any time. The Court was not persuaded by the petitioners' central argument that the timing of the conversion was improper. Eco had the right to effect the conversion at any time, and its decision should be afforded reasonable deference under the business judgment rule. It was reasonable that Eco would want the new shares to be issued before the meeting so that the new shareholders could participate. Moreover, the upcoming meeting to replace Eco's board did not mean that the board must halt all action; Eco must continue to operate as usual in the interim.

Shortly before releasing the above decision, the Court was informed that the Ontario Securities Commission (OSC) had issued an order setting aside its earlier decision to approve Eco's issuance of new shares, and ordering that the new shares may not be voted at the upcoming shareholders' meeting. In response, the Court issued additional reasons, adjourning the shareholders' meeting to a later date to be set by Eco. The Court based this decision on the perceived conflict between its earlier decision and that of the OSC.

The petitioners appealed both the Court's decision dismissing the oppression claim, and its subsequent decision to adjourn the shareholders' meeting to a later date.

The Court of Appeal overturned the adjournment of the shareholders' meeting, finding that the lower Court was incorrect to characterize the OSC's decision as being in conflict with its own. The error was the result of a failure to account for the differing purposes of the *Business Corporations Act* and the *Securities Act*. The former is concerned with corporate governance generally and does not regulate public securities markets, while the latter is regulatory and aimed at ensuring fair and efficient operation of markets in the public interest. Though similar relief was sought in the Supreme Court and the OSC, the orders issued in each were unrelated. The sole issue before the Supreme Court was whether oppression was established, and Ontario securities law was not relevant to this issue. The Court of Appeal has not yet ruled on the oppression issue.

## *LBP HOLDINGS LTD. V. HYCROFT MINING CORPORATION,* 2017 ONSC 6342

In this decision, the Ontario Superior Court of Justice certified, by consent, a securities class action brought against the operator of a Nevada gold mine alleging primary market misrepresentation in connection with a "bought deal" public offering, but dismissed the application for certification brought against the companies that underwrote the offering.

Hycroft Mining Corporation, which operates the Hycroft Gold Mine in Nevada, effected a cross-border US$150 million secondary public offering of shares of common stock. The offering was financed as a "bought deal" with Cormark Securities and Dundee Securities (the Underwriters) acting as principals, both of which had conducted due diligence and certified that the prospectus, to the best of their knowledge and belief, contained full, true, and plain disclosure of all material facts. It was later alleged, however, that representations about the gold mine's production violated Hycroft's disclosure obligations because the prospectus omitted certain operational problems at the mine that had hindered gold production. Hycroft later disclosed these problems, leading to a two-day decline in share value. The plaintiff, a Hycroft shareholder, commenced a proposed class action against Hycroft. The plaintiff also sued the Underwriters for negligence and negligent misrepresentation, again as a class proceeding.

Hycroft consented to certification of the *Securities Act* claim in exchange for the plaintiff's agreement to abandon the common law tort claims it had also made against Hycroft.

As for the action against the Underwriters, the Court concluded that a class action would not be the preferable proceeding. This conclusion rested

largely on the Court's consideration of the torts the plaintiff alleged. The elements of reliance, causation and damages raised highly individual issues that would inevitably have to be proven at individual issues trials. Further, the common issues of the statutory claim against Hycroft were not congruent with the common issues of the tort claims against the Underwriters, which, again, reduced the benefits of a class action. The Court observed that the Underwriters' representations differed from those of Hycroft, and could be true even if Hycroft made misrepresentations in the prospectus. The Underwriters' duty and standard of care in negligence also differ from that of Hycroft. While the claims against Hycroft and the Underwriters arise out of a common factual narrative, they do not rest on the same factual or legal foundation. As such, findings made in the claim against Hycroft would only moderately assist in prosecution of the claims against the Underwriters.

## *WONG V. PRETIUM RESOURCES*, 2017 ONSC 3361

In this decision, the Ontario Superior Court of Justice granted a shareholder leave to proceed with a securities class action against Pretium Resources Inc. for secondary market misrepresentation under s. 138.8 of the Ontario *Securities Act*.

Pretium, a Vancouver-based mineral exploration company developing a gold mine in northwest British Columbia, hired a mining consultant to produce a mineral resource estimate. This estimate was relied on in a feasibility study concluding that the project was viable. Another consultant was retained to test and verify the validity of the mineral resource estimate using a "sample tower" test which relied on a relatively small sample size. Based on this test, the consultant concluded that the mineral resource estimate was materially inaccurate and unreliable. Pretium disagreed, and did not publicly disclose the consultant's conclusion. The consultant eventually resigned over the issue, and Pretium thereafter disclosed the consultant's conclusion, though it also expressed its disagreement. The plaintiff, who had purchased Pretium shares only to see their value plummet after the announcement, claimed that the sample tower test results and the consultant's concerns ought to have been disclosed. As it turned out, Pretium was proven right—the sample tower results were inaccurate, and the mine was viable.

Despite this, the Court held that the plaintiff had a reasonable possibility of success, finding that Pretium should have disclosed the sample tower test results and the consultant's concerns. The opinion of an experienced mining consultant was material regardless of Pretium's concerns about the reliability of the test, particularly since Pretium publicly announced its hiring of the consultant, described the consultant as a "recognized expert," and confirmed publicly that the sample tower was an integral part of its testing process. Pretium had the right to voice its concerns about the reliability of the test when it disclosed the information.

# Surface Rights/Liens

*Aidan Cameron, Kate Macdonald and Jack Ruttle*

## *HAWES V. DAVE WEINRAUCH AND SONS TRUCKING LTD.*, 2017 BCCA 114

This case involved the propriety of a sale of subsurface rights.

The plaintiffs were caretakers of a former mine site that had been active until 1960. They resided in buildings on the former mine site and paid rent to the owner of the mineral claims, Boliden Westmin (Canada) Ltd. Boliden commenced steps to sell the property to the plaintiffs, but the contract was never executed. Assurances were made, however, that the plaintiffs should treat the buildings "as theirs". Boliden was acquired by another company, which changed Boliden's name to NVI Mining Ltd. NVI later sold the property, including the subsurface rights, to Dave Weinrauch and Sons Trucking Ltd. The plaintiffs disputed the sale, claiming they had an equitable interest in the property because Boliden and NVI had agreed to quitclaim the portion of the mineral claim under the lots on which they lived.


The British Columbia Supreme Court rejected the plaintiffs' arguments, finding that they had no equitable claim to the subsurface rights and that the conveyance was lawful. Although Boliden had made a representation, it was repudiated when Boliden was sold, had its board replaced, and changed its name to NVI. [1]

The decision was upheld on appeal. The Court of Appeal found that Boliden's representation amounted to no more than a willingness to negotiate with the plaintiffs about purchasing the property, and that NVI subsequently did nothing to lead the plaintiffs to believe the houses would be theirs if they continued to live on and be caretakers for the property. Neither Boliden nor NVI induced the plaintiffs to do anything. Accordingly, the plaintiffs had no equitable claim against Boliden or NVI, and therefore also had no claim against Weinrauch.

1. 2015 BCSC 1727; see *Mining in the Courts*, Vol. VI.

## *NATIONAL BANK OF CANADA V. KNC HOLDINGS LTD.*, 2017 SKCA 57

In this decision, the Saskatchewan Court of Appeal held that s. 22 of the Saskatchewan *Builders Lien Act* does not describe priorities, but instead clarifies the nature of the assets to which liens attach.

Coast Resources Ltd., an oil and gas company, received various loans from National Bank of Canada, and granted security in exchange. National Bank registered its security interests against Coast Resources' real and personal property. Coast Resources' indebtedness grew, leading National Bank to successfully obtain the appointment of a receiver. The receiver became aware of several builders' liens that had been registered against Coast Resources' property and decided that three of those liens had priority over National Bank's security. Those liens were paid out, while the remaining liens were not. Pursuant to a court order, the receiver held back the remaining lien funds pending determination of the priority between National Bank and the lienholders. The chambers judge, considering himself bound by the Saskatchewan Court of Appeal's decision in *Canada Trust Co. v. Cenex Ltd.* (1982), 131 D.L.R. (3d) 479 (*Cenex*), gave the lienholders priority. National Bank appealed.

**BUILDERS LIENS IN SASKATCHEWAN DO NOT TAKE PRIORITY OVER OTHER SECURITY INTERESTS.**

The Court of Appeal allowed the appeal. After considering the legislative history and broader context of s. 22, the Court overturned its previous decision in *Cenex*, which held that a predecessor to s. 22 gave lienholders priorities over other types of security interests. The Court of Appeal found that nothing in s. 22 speaks to the priority of builders liens relative to other kinds of security interests. Section 22(2), which concerns the reach of builders liens in the specific context of mineral extraction operations, also says nothing about the priority of the liens. As *Cenex* was no longer good law, the chambers judge's decision could not stand.

# Federal Court Upholds Hot Re-Fueling Patent for Fracking Machinery

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

Patents present complex, but valuable opportunities for businesses. In this oilfield patent infringement case (*Frac Shack Inc. v. AFD Petroleum Ltd.*, 2017 FC 104, appeal ongoing A-63-17), the plaintiff, Frac Shack, sold only one product, a simple but innovative fuel tank refilling system that it protected by patent. When Frac Shack discovered that the defendant, AFD, was competing with it by selling its patented technology, it sued for patent infringement.

The Federal Court held that the patent was infringed and awarded Frac Shack an accounting of AFD's profits, reasonable compensation for the period between publication of the application and patent issuance, and a permanent injunction restraining any further infringement until the patent expires in 2030.

The patent at issue concerned a fuel tank refilling system used with hydraulic fracturing machines. The invention was designed to replace a dangerous practice called "hot refuelling." At a typical fracking site, multiple diesel engines power various pieces of wellsite equipment. Each engine has its own diesel fuel tank. Ideally, the equipment and the engines would run around-the-clock to minimize downtime and prevent wellbore deformations. To do this, it is critical that each engine is adequately fueled. Fuel levels are continuously monitored and fuel tanks are refueled as needed.

When fuel levels dip too low during operations, a fuel tank has to be refilled while the equipment and engines are running. To do this, many businesses used hot refuelling, whereby workers travel between running equipment and engines with a charged fuel hose manually refilling the fuel tanks. Frac Shack solved this problem by connecting the diesel fuel source to the individual fuel tanks with multiple attached hoses. Recognizing that its solution was novel, in 2010, Frac Shack applied for a patent.

In 2014, when the patent was issued, Frac Shack sued AFD for infringement. In defence, AFD alleged that the patent was invalid for three reasons:

- insufficiency of disclosure because the patent did not adequately teach the public how to use the invention;
- claim overbreadth because the patent's claims encompassed embodiments that were not useful; and
- obviousness because the invention claimed would have been obvious to the notional "person skilled in the art."

The Court agreed with AFD in part, invalidating some of the claims. For example, the Court found that a subset of the claims was broader than the invention because they failed to disclose a fuel level sensor, which was required to make the invention useful. As well, other claims were determined to be overbroad because they were not limited to use during fracturing operations at a wellsite, the invention that had actually been made. However, the Court rejected AFD's arguments that the claims were obvious, and in the end, many of the claims survived the various invalidity attacks.

**ENFORCEMENT OF PATENT ALLOWED LONG-TERM MONOPOLY.**

As for infringement, certain claims were admitted to be infringed if they were valid. Once the invalidity attacks on those claims were rejected, a finding of infringement necessarily followed. Infringement of other surviving claims was contested. In the end, a number of claims were held to be infringed because AFD's refuelling system had taken all of their essential elements. Accordingly, Frac Shack was entitled to a remedy.

The Court awarded an accounting of profits, requiring AFD to disgorge to Frac Shack the whole profit it had made on its infringing refueling systems. At this stage, AFD argued that it had a "non-infringing alternative" defence. In a non-infringing alternative defence, the defendant proves that it could and would have made the same profit by selling a non-infringing product. Therefore, the profits caused by the infringement are nil, and there are no profits to disgorge.

The Court rejected AFD's non-infringing alternative defence because the alleged non-infringing alternative was not a true salable alternative. AFD's alleged non-infringing alternative was to use hot refuelling — the very

problem solved by the invention. Hot refuelling was not a product ADF could have sold. It was simply a longstanding refuelling method used in the field.

The Court additionally awarded Frac Shack reasonable compensation for the period between publication of the patent application and patent issuance. The Court awarded a reasonable royalty at the licensing rate that would have been negotiated between willing parties, in this case, 29% of revenues.

Last, the Court awarded a permanent injunction, restraining further infringement by AFD until patent expiry in 2030.

Although Frac Shack requested an award of punitive damages, the Court declined to award them. The Court held that the high test to award punitive damages — malicious, oppressive and high-handed misconduct — had not been met in this straightforward patent case.

As this case illustrates, patents are among the most valuable assets that natural resource companies own. By enforcing its patent rights, Frac Shack succeeded in obtaining a further 13-year monopoly on its only product.

AFD has appealed to the Federal Court of Appeal.

# Tax

*Aidan Cameron, Kate Macdonald and Jack Ruttle*

## *BARRICK GOLD CORPORATION V. THE QUEEN*, 2017 TCC 18

In this decision, the Tax Court of Canada considered whether profits earned on closing out derivative instruments can be included in a company's gross resource profits for the purpose of calculating a company's resource allowance under the now-repealed s. 20(1)(v.1) of the *Income Tax Act* (ITA).

Under section 20(1)(v.1) of the ITA, mineral producers were allowed to deduct a 'resource allowance,' or a percentage of their income earned from processing minerals. This income was called the 'gross resource profits' and was calculated in accordance with requirements from the regulations. Barrick would enter into derivatives for its anticipated gold production to hedge the risk associated with fluctuations in the price of gold. It did not enter into the derivatives for the purposes of speculation. When filing its taxes, Barrick included the profits it realized from closing out its derivatives in its gross resource profits. The Minister disallowed the inclusion of the profits from its derivatives on the basis that the profits were not sufficiently connected to Barrick's production and processing activities after Barrick sold the gold mine associated with the derivatives. Barrick appealed.

The Court found that Barrick's profit fell within the definition of 'gross resource profits' and so Barrick was entitled to the full resource allowance claimed in its 1998 taxation year. In doing so, the Court rejected the Minister's argument that 'income from production and processing' is restricted to income derived from extraction from the ground. Rather, the Court found that physical extraction is not necessary, that the income from the derivatives met the test of being sufficiently connected to the business of producing and processing to constitute income from that source. The Court referred the matter back to the Minister for reassessment.

## *FLINTSTONE MINING DIVISION LTD. V. BRITISH COLUMBIA*, 2017 BCSC 1328

In this case, the British Columbia Supreme Court considered whether a contractor's purchases of machinery and equipment in connection with a mining operation qualified for an exemption from sales tax.

Flintstone Mining Division Ltd. was incorporated for the purpose of being engaged by a company that owned a copper and gold open pit mine to carry out dam construction at the mine. Later, Flintstone was engaged by the company to perform work on a tailings storage facility and to remove rock that had collapsed into the open pit to allow for the continued extraction of ore. Flintstone purchased various pieces of equipment, including excavators, haul trucks, dozers, dump trucks, and a crusher, for use in its work. Flintstone claimed an exemption from sales tax, relying on an exemption from sales tax for machinery and equipment purchased for use exclusively in the 'development of mines,' which was in the regulations to the former *Social Service Tax Act* (now the *Provincial Sales Tax Act*). The exemption was disallowed. Flintstone unsuccessfully appealed to the Minister of Finance, and subsequently to the B.C. Supreme Court.

The Court reasoned that the word 'development' in the legislation was limited to 'the uncovering of a body or area which is to be the subject matter of the extraction process and the preparation of the deposit or mining site for actual mining,' and that the machinery and equipment in issue could not be the subject of an exemption because it had been purchased for use in *post-development* operations such as production, operation or extraction. The Court went on to find that even if Flintstone's work could be considered development of a mine, the company could not benefit from the exemption because it did not regularly engage in the development of 'mines,' which was a further requirement under the relevant exempting provision. The Court noted that Flintstone had only been involved with 'one dam in relation to one mine', and not multiple 'mines' as required by the statutory language. Accordingly, it was not entitled to an exemption from sales tax.

## *SIFTO CANADA CORP. V. THE QUEEN*, 2017 TCC 37

In this case, the Tax Court of Canada confirmed that the Canadian Revenue Agency (CRA) has no authority to issue assessments under the *Income Tax Act* that run contrary to agreements reached between Canadian taxpayers and the Canadian and U.S. tax authorities under the *Canada–United States Tax Convention*.

Sifto operated a salt mine in Ontario, and sold rock salt to its U.S. parent company. After Sifto voluntarily disclosed to the CRA that it had under-reported its income from sales of rock salt to the U.S. parent company, the CRA adjusted Sifto's 2002-2006 income upwards and reassessed Sifto for

those years. As a result, the income from 2002-2006 was taxed twice: in the hands of Sifto and its U.S. parent company. The companies applied to the Canadian and U.S. tax authorities for relief from double taxation under the *Canada–United States Tax Convention*. The two tax authorities and the companies reached agreements fixing the arm's length transfer price of the salt for the relevant years. Subsequently, the CRA audited Sifto and reassessed the arm's length transfer price of the salt for the years 2004-2006 at a price higher than that agreed upon by the two tax authorities and the companies. The Minister argued she was bound to administer and enforce the *Income Tax Act* by issuing the reassessment.

On appeal, the Tax Court of Canada confirmed that the CRA will not be permitted to issue a reassessment that is inconsistent with a settlement agreement reached with the taxpayer, nor can the CRA rely on the *Income Tax Act* to subordinate a "mutual agreement" reached under the *Canada–United States Tax Convention*. Rather, the provisions of the *Convention* were to be given paramountcy over the provisions of the *Income Tax Act*. The Tax Court of Canada remitted the matter to the Minister of National Revenue for reconsideration.

## *THOMPSON CREEK MINING LTD. V. BRITISH COLUMBIA*, 2017 BCSC 1128

In this case, the British Columbia Supreme Court offered guidance on when mining companies may claim the 'new mine allowance' under s. 5(1)(a)(iv) of the *Mineral Tax Costs and Expenditures Regulation*, which permits the deduction of certain capital expenditures in tax filings when the output of the mine is at least 25% more in the fiscal year following an expansion.

The petitioners operated a molybdenum mine. The petitioners determined that the mine required substantial upgrading and carried out a major expansion project that started in 2008 and completed in 2012. The expansion resulted in a 70% increase over capacity prior to the expansion. In their tax filings, the petitioners claimed they were entitled to a deduction of one-third of the capital expenditures made in 2008 and 2009 — which totalled C$64.5 million and C$36.2 million, respectively — under the new mine allowance. In 2015, the government issued notices notices of assessment disallowing the deductions. The petitioners appealed unsuccessfully to the Minister of Finance. They then brought a further appeal to the B.C. Supreme Court.

The Court analyzed the statutory language and held that the new mine allowance only becomes available beginning in the first fiscal year following completion of an expansion. In this case, the petitioners were not entitled to claim the new mine allowance until 2013.

# Torts

*Aidan Cameron, Kate Macdonald and Jack Ruttle*

## *TASEKO MINES LIMITED V. WESTERN CANADA WILDERNESS COMMITTEE*, 2017 BCCA 431

This case concerns an appeal by Taseko of the trial judge's decision dismissing its defamation claims against the Western Canada Wilderness Committee (WCWC) and awarding WCWC costs. The trial-level decision was reported in *Mining in the Courts*, Vol. VII.

Taseko claimed that five articles posted on WCWC's website defamed Taseko. The first three articles made various statements about proposals Taseko had submitted for a new mine. After Taseko initiated a defamation claim against WCWC and a WCWC director and employee who had written two of the articles, the fourth and fifth articles were published which stated that Taseko had initiated the lawsuit "to silence critics on a matter of public importance."

The British Columbia Court of Appeal upheld the trial judge's findings that the first three articles were not defamatory and that although the fourth and fifth were defamatory, they were protected by the defence of fair comment. However, the Court set aside the trial judge's award of special costs. The trial judge had considered Taskeo's claim for punitive damages to be an economic threat potentially intended to silence critics but did not make any findings on this issue or determine that Taseko had an improper purpose in filing the claim. The trial judge nonetheless held that Taseko's claim for punitive damages was unreasonable and should have been abandoned once a particular environmental report was released.

The Court noted that the trial judge 'missed a step in the analysis' regarding special costs. Taseko's continuing claim for punitive damages was based on Taseko's pleading of malice on the part of the defendants, and in order to find Taseko's continuing plea of malice to be reprehensible, the judge needed to find that there was no merit in that plea. However, the trial judge held that two of the five articles were defamatory – meaning that malice was made out and there *was* merit to the plea. The trial judge accordingly erred in ordering special costs on the basis that the pleading should have been withdrawn.

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