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Mining in the Courts
Year in Review

Vol. X - March 2020

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Welcome to *Mining in the Courts*, Vol. X – Our 10th Year!

This is the 10th anniversary edition of *Mining in the Courts*, a publication that provides a one-stop annual update on legal developments impacting the mining industry.

The mining industry continued to be a significant contributor to Canada's economy over the past decade, and with that important role has also come prominence in Canadian courts. The industry has been front and center on a number of developments across many different areas of law, including conflicts and jurisdiction, contracts, class actions, environmental law, labour and employment, municipal law, tax and tort. Each year we have updated you on the latest developments in these areas and others, through summaries of recent cases and our featured commentary on issues of interest.

Our readers will notice that we have a new look this year, and new features. One area of perpetual evolution, challenge and opportunity for the industry is aboriginal law. In recognition of our 10th year, we have taken a new approach to updating you on this key area. With thanks to our contributors Stephanie Axmann, Bryn Gray and Meghan Bridges, the most important aboriginal law cases from the last year are grouped by issue, instead of by case name, so that you can quickly identify the areas of development. These include the newest cases on the Crown's duty to consult, injunctive relief, and a decision about providing Indigenous evidence by panel or collective.

While some things change, others stay the same. In this issue, we continue to provide our insights on current legal trends and what the industry can expect to face in the coming year. Noteworthy articles in this edition include *State of the (Carbon) Nation: An Update on Carbon Pricing in Canada* (page 30) and *Is the Risk of Workplace Impairment Enough to Constitute Undue Hardship?* (page 52). We hope you find these, and the other articles, useful.

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, in collaboration with the extensive expertise of our mining business lawyers. Together we achieve positive outcomes for our clients.

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Article

Uncertain Road Ahead as B.C. Begins Ambitious Work to Implement UNDRIP

Stephanie Axmann, Bryn E. Gray and Selina-Lee Anderson

On November 28, 2019, *British Columbia's Declaration on the Rights of Indigenous Peoples Act* (DRIPA) received Royal Assent. This made B.C. the first jurisdiction in Canada to pass legislation that will provide a framework to implement the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) into its own laws. DRIPA is intended to form the foundation for B.C.'s work on reconciliation. Its three stated purposes are to: (i) affirm the application of UNDRIP to the laws of B.C.; (ii) contribute to the implementation of UNDRIP; and (iii) support the affirmation of, and develop relationships with, Indigenous governing bodies. As a framework piece of legislation, DRIPA provides that the provincial government (Province):

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

DRIPA received unanimous support in the B.C. legislature from all parties. It has also received widespread support from Indigenous leadership across B.C. and Canada, having been developed together with the First Nations Leadership Council of B.C. (comprising the leadership of the British Columbia. Assembly of First Nations, the First Nations Summit and the Union of British Columbia Indian Chiefs). The Province has promoted DRIPA as a means of "supporting predictability and economic opportunities" and creating "further certainty for investment and opportunities for business while creating a strong inclusive economy."[1] During legislative debates on DRIPA, the B.C. Minister of Indigenous Relations and reconciliation clarified that this legislation does not bring UNDRIP into legal effect and that there will be no immediate effect on laws.[2] Despite these assurances, DRIPA's text and the implementation of UNDRIP into B.C. laws gives rise to numerous questions.

In this article, we highlight some of the key unresolved questions of interpretation, and discuss the anticipated impacts of DRIPA on current practices in the mining sector in the short and long term.

UNDRIP at a Glance

UNDRIP was adopted by the United Nations General Assembly in 2007. It was initially opposed by Canada (along with the United States, Australia, and New Zealand) and then conditionally endorsed in 2010 as an aspirational document with no impact on Canadian law. The then federal government expressed particular concerns about the provisions relating to obtaining the free, prior, and informed consent (FPIC) of Indigenous groups in certain circumstances, which are discussed further below.

UNDRIP contains 46 articles describing the minimum standards for individual and collective rights of Indigenous peoples, including in respect of Indigenous culture, identity, religion, language, health, education and community, and emphasizes Indigenous peoples' right to self-determination. Several articles address Indigenous land and resource rights, including requirements for states to seek or obtain FPIC of Indigenous groups in certain circumstances.[3] This includes obtaining FPIC "prior to the approval of any project affecting their lands, territories or resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."

The question of whether FPIC amounts to a veto over resource development has received by far the most attention in Canada. As the Province proceeds to implement UNDRIP, however, other articles respecting Indigenous land rights may come into increased focus. For example, Article 26(1) of UNDRIP provides that "Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired." This broad language raises questions of how these rights should be recognized, how they will affect private or third-party rights or interests, and whether this conflicts with Canada's constitutional and common law duty to consult framework. Article 28 is also notable because it provides for a right of redress, through restitution or compensation, in respect of Indigenous lands, territories or resources that "have been confiscated, taken, occupied, used or damaged without" having obtained FPIC. Attention has largely been given to UNDRIP's

1 Reconciliation legislation fosters greater economic certainty (Oct. 24, 2019): https://archive.news.gov.bc.ca/releases/news_releases_2017-2021/2019PREM0116-002041.htm

2 https://www.leg.bc.ca/content/hansard/41st4th/20191119am-Hansard-n291.pdf at 10523; https://www.leg.bc.ca/content/hansard/41st4th/20191125pm-Hansard-n297.pdf at 10761

3 References to FPIC are included in Articles 10, 11(2), 19, 28(1), 29(2) and 32(2) of UNDRIP.

potential impacts on new projects, although Article 28 raises questions of how existing projects in B.C., including renewals, could be affected and whether FPIC should be applied retroactively in certain situations.

DRIPA – Questions of Interpretation

Given the breadth of subject matter in UNDRIP, DRIPA is an extremely ambitious piece of legislation, requiring the Province to review and potentially amend a vast array of acts, regulations and policies, or create new ones. This ambition is amplified by the s. 3 requirement for the Province to "take all measures necessary to ensure the laws of B.C. are consistent with" UNDRIP. This language raises questions as to how B.C.'s success at implementing UNDRIP will be measured. First, the requirement to "take all measures necessary" creates significant expectations and lacks any reasonableness qualifiers or other flexibility. Second, the requirement for laws to be "consistent with" UNDRIP is not further defined and will likely lead to disputes about whether the B.C. government's interpretation of UNDRIP is consistent with UNDRIP. This is particularly the case given that numerous provisions of UNDRIP are subject to differing interpretations, including the FPIC provisions. DRIPA includes no parameters for determining what measures would be considered sufficient to achieve these requirements, or by whose standard success or consistency should be measured. The Province's decision to adopt the legislation without first developing a well thought-out and transparent plan to actually implement UNDRIP will likely expose it to criticism and legal challenges down the road, setting itself up for failure in its implementation efforts.[4]

A further concern has been whether the passage of DRIPA results in the immediate effect of UNDRIP, and could thereby invalidate existing laws if deemed by a court to be inconsistent with UNDRIP. This concern arises from the language in s. 1(v), which states: "nothing in this Act is to be construed as delaying the application of the Declaration into the laws of B.C.," and s. 2(a) in which one of the Act's purposes is to "affirm the application of the Declaration to the laws of B.C."[5] It will ultimately be up to the courts to determine the effect of the legislation, but there are strong arguments against it having any immediate effect on existing laws. During the legislative debates and the rollout of DRIPA, the Province stated that the intention is not for DRIPA to have immediate effect on or change any existing laws. Rather, it is intended to be forward looking, and implementation will be a gradual and incremental process as laws are introduced or amended, and "will require consultation with Indigenous peoples and stakeholders including business, industry and local government."[6] Such statements strongly indicate that the legislative intent is not to invalidate laws if they are presently "inconsistent" with UNDRIP. The language used in DRIPA is also not consistent with the language typically used when a legislature adopts an international instrument into Canadian law.

The Province released a UNDRIP Mining Factsheet[7] which similarly states that the Ministry of Energy, Mines and Petroleum Resources (EMPR) does not anticipate DRIPA giving rise to any immediate, significant changes to the provincial mining regulatory framework, but that a gradual, incremental implementation of UNDRIP will occur. It emphasizes transparency and collaboration in this process, foreseeing a role for both Indigenous groups and stakeholders. What such changes will ultimately look like will depend on: (i) the contents and priorities of the action plan, once developed, (ii) the content of agreements that may be entered into under DRIPA, and (iii) future court decisions addressing DRIPA or other legislation that will eventually be implemented or amended under DRIPA.

The Duty to Consult

DRIPA is not intended to result in any immediate changes to the common law duty to consult framework. The Mining Factsheet also states that DRIPA "does not change how EMPR consults with First Nations nor how operational decisions are made. Any future changes would come in collaboration with all parties, including business sector, Indigenous nations and local government." That said, it is expected that legislation will over time be amended to modify and deepen current legislated consultation requirements. B.C.'s new *Environmental Assessment Act* provides an example of the types of changes that could potentially be applied in other contexts, which we discuss further below.

4 Notably, the language in s. 3 of DRIPA is virtually identical to the language in s. 4 of the federal government's failed Bill C-262. Bill C-262 sought to harmonize federal laws with UNDRIP but failed to pass the Senate in June 2019, largely due to concerns surrounding the potential unintended consequences of such broad language and lack of clarity with respect to interpretation.

5 This affirmation language in s. 2(a) (Purposes of Act) differs slightly from the language in federal Bill C-262, which expressly stated that UNDRIP "is hereby affirmed as a universal international human rights instrument with application in Canadian law."

6 Reconciliation legislation fosters greater economic certainty (Oct. 24, 2019): https://archive.news.gov.bc.ca/releases/news_releases_2017-2021/2019PREM0116-002041.htm

7 B.C. *Declaration on the Rights of Indigenous Peoples Act* Fact Sheet: https://news.gov.bc.ca/files/UNDRIP-Legislation_Factsheet-Mining.pdf

One foreseeable change resulting from DRIPA could be an increase in the number of parties with whom consultation is expected to occur. The Province has acknowledged that DRIPA is intended to carve out recognition for additional forms of Indigenous governments, including multiple First Nations working together as a collective, as well as hereditary governments "as determined and recognized by the citizens of the Nation." "Indigenous governing body" is broadly defined in DRIPA as "an entity that is authorized to act on behalf of Indigenous peoples" that hold s. 35 rights. One of the purposes of DRIPA is "to support the affirmation of, and develop relationships with, Indigenous governing bodies," and DRIPA enables government to enter into agreements with Indigenous governing bodies. The Province states that this increased recognition will "provide more clarity for businesses and communities about who to engage when working with Indigenous partners." However, in the short term, it could also give rise to uncertainties in identifying the proper representatives of Indigenous rights holders in situations where there is both elected and hereditary leadership, and by what measures they are deemed to be authorized.

Free, Prior and Informed Consent

The Province states that DRIPA does not create any immediate or new consent requirements, and statements from the Premier and other government representatives have indicated that the Province does not view FPIC as equivalent to an unqualified veto right. However, consent could notionally become the standard in certain circumstances, whether through the use of the agreement mechanism under DRIPA, through legislative amendments, or as a condition to granting a project approval.

Applying FPIC through agreements – The legislative intent of the agreement mechanism under DRIPA appears to be to provide a tool or mechanism for the government to work together with Indigenous groups on decision-making processes on matters that will affect them. This includes express contemplation of a negotiated consent requirement prior to a government decision. The Province has emphasized that these agreements can be used in instances "where mechanisms exist in applicable legislation – with clear processes, administrative fairness and transparency." Despite the potentially broad subject matter of the agreements, it is important to note that the entry into such agreements is discretionary. Given the Province's emphasis on creating transparency and certainty, it is expected that the Province will want to avoid undue disruption of current regulatory regimes.

Applying FPIC through legislation – The Province's philosophy towards FPIC in the new environmental assessment context provides a potential model for the application of FPIC in other contexts and under other provincial legislative regimes. In the rollout of the new B.C. *Environmental Assessment Act*, the Province articulated its position on FPIC in the context of environmental assessments: "Obtaining [FPIC] is an integral aspect of [UNDRIP]. The new EA process is designed to ensure that any decision taken on the question of consent by an Indigenous nation is free, prior and informed. Respectful of their own Indigenous laws, traditions and right of self-determination, a key objective of the new EA process is to create the opportunity for Indigenous nations to make a decision on consent. It is an objective that proponents, the Province and Indigenous nations should be working to achieve. The new EA process facilitates that objective throughout the process."

The new B.C. *Environmental Assessment Act* focuses on achieving consensus in decision-making and allowing Indigenous groups to communicate their consent or lack of consent at two EA decision points: (i) at the EA readiness phase, to exempt the project from an EA and go straight to permitting, or terminate the process; and (ii) whether to issue an EA Certificate for the proposed project. In the event that consensus cannot be achieved, a dispute resolution mechanism will be available under the *Dispute Resolution Regulation*, which is expected to be released in mid-2020. Although ministerial discretion is maintained in respect of all final project approvals, the decision must take into account and provide reasons where consent has not been obtained. The Minister will also be able to enter into agreements with Indigenous groups for the purposes of conducting any aspect of an EA.

This philosophy of aiming to secure FPIC in the environmental assessment context could be an indicator of the Province's approach to FPIC in future situations and under other legislation. However, the agreement mechanism under DRIPA, the agreement approach under the new EA Act, as well as decision-making authority under the new EA, all remain discretionary approaches on the part of government. Therefore, outcomes, and the application of FPIC will largely depend on the Province's willingness to allocate certain responsibilities and authority to Indigenous groups, and this could be highly contextual.

Impact of DRIPA

It is no secret that there is already a significant divide between what the law requires (in terms of the minimum

standards of consultation and accommodation) and the expectations of Indigenous groups and government decision-makers. Consent is increasingly viewed by Indigenous groups as the *de facto* standard for developments that will impact their rights and territories. For the most part, government and proponents operate with the ultimate goal of achieving the support of all affected First Nations. The passage of DRIPA is a formal recognition of existing best practices approaches as a means of generating prosperity and certainty for resources development.

Although it appears that DRIPA is intended to provide the Province with discretionary and incremental approaches in implementing UNDRIP, ultimately, DRIPA is significant because it creates an increased level of scrutiny and accountability on the part of the Province to now make good on its promises. The challenge for the Province is to move forward on these commitments in a way that does not stifle investment or create even more uncertainty. To do so, it must manage the enormous expectations it has created while striking a fair balance with competing interests. None of which present an easy task.

Case Law Summaries

Aboriginal Law

Stephanie Axmann, Bryn Gray, Meghan Bridges and Aidan Cameron

Developments in the Duty to Consult

No Change to Consultation Obligations in the Context of Asserted Aboriginal Title Claims

In 2019, two notable cases addressed the required scope and standard of consultation in the context of asserted but unproven Aboriginal title claims: *Ross River Dena Council v. Yukon, 2019 YKSC 26 and Mi'kmaq of P.E.I. v. Province of P.E.I.* et al, 2019 PECA 26.

In *Ross River Dena Council v. Yukon*, the Supreme Court of Yukon considered the important distinction in consultation obligations between asserted title versus established title. This case arose from Yukon's issuance of hunting licenses and seals and the Court considered whether Ross River Dena Council (RRDC), by virtue of its asserted claim for Aboriginal title, was entitled to consultation that addressed the suite of ownership rights of established Aboriginal title as set out by the Supreme Court of Canada (SCC) in *Tsilhqot'in Nation*. This suite of ownership rights includes the right to use, possess, and manage the land, the right to the economic benefits of the land, and the right to decide how the land will be used.

The Court found that the ownership rights only apply to established Aboriginal title and that RRDC was at the claim stage of asserting Aboriginal title, not at the final resolution or shortly before a finding of Aboriginal title. The Court concluded that deep consultation (and accommodation) was owed and had occurred and there was no requirement for Yukon to literally apply and assess the *Tsilhqot'in Nation* incidents of established Aboriginal title in its deep consultation with RRDC on wildlife matters. The Court also notably reiterated that the duty to consult does not grant the RRDC a veto over any development, nor was there an obligation to obtain the RRDC's consent for any developments in this area due to its asserted Aboriginal title claim.

In *Mi'kmaq of P.E.I. v. Province of P.E.I. et al*, the Prince Edward Island Court of Appeal issued its first judicial review decision concerning the duty to consult. This case confirms that mere assertions of Aboriginal rights, including title, are insufficient to trigger a duty to consult if there is no evidence that the Crown decision will have an adverse impact on the asserted rights.

The province of P.E.I. intended to sell a Crown-owned golf course and resort to a private party. Prior to completing the sale, the province consulted with the P.E.I. Mi'kmaq, who claim Aboriginal title to all of P.E.I. The Mi'kmaq sought judicial review on the basis that the province did not satisfy its duty to consult. Despite the fact that Aboriginal title is the strongest form of Aboriginal right, the Court held that the duty to consult was not triggered, as there was no evidence of a causal connection between the transfer of ownership of the property from the Crown to the private sector and a potential adverse impact on the Mi'kmaq's claim for Aboriginal title. The land at issue had been used as a golf course since 1983 and the purchaser intended to continue to use the property in the same way. The Court also found that the claim to Aboriginal title was weak, as there was no evidence beyond assertions to establish sufficiency of occupation at the time of the Crown sovereignty and no use of the property, either historic or present day, to be protected pending proof of the Mi'kmaq claim. The land was not shown to be unique and there was no historic association, structures or sites or present use that needed to be protected. There was also no evidence of a shortage of Crown land that could be used in the event of a future settlement of the claim. The Court concluded that even if the duty to consult had been triggered, it would have been at the low end of the spectrum and had been satisfied.

This decision underscores the reciprocal obligations of Indigenous groups in consultation and the potential consequences when they are not fulfilled. The P.E.I. Court of Appeal noted several instances where the P.E.I. Mi'kmaq did not meet their reciprocal obligations which likely impacted the outcome in this case.

Taking Up of Land in a Treaty Area Doesn't Automatically Trigger the Duty to Consult

In *Athabasca Chipewyan First Nation v. Alberta*, 2019 ABCA 401 the Alberta Court of Appeal dismissed an appeal in which the Athabasca Chipewyan First Nation (ACFN) asserted that there was a duty to consult all Treaty 8 First Nations any time land is taken up for a project in the Treaty 8 area. The Court of Appeal rejected that position, holding that it cannot be presumed that a First Nation suffers an adverse effect by the taking up of any land in a treaty territory. A contextual analysis must be undertaken to determine if there is the potential for an adverse impact on Aboriginal or treaty rights from the Crown decision at issue.

The case related to a proposed pipeline project and the determination by the Alberta Aboriginal Consultation Office (ACO) that the ACFN was not one of the Indigenous groups that needed to be consulted. The proponent still consulted the ACFN and it had an opportunity to make submissions to the Alberta Energy Regulator. While the ACFN did not challenge the Alberta Energy Regulator's approval, it instead sought judicial review of the ACO's determination about who needed to be consulted. The AFCN argued the ACO lacked the authority to make this decision and that it needed to be consulted whenever there is a project anywhere in the 840,000 square km area encompassed by Treaty 8.

Both the Court of Queen's Bench and the Alberta Court of Appeal rejected these arguments. The Court of Appeal held that the ACO had the jurisdiction to determine who needs to be consulted for a particular project and that there was no at-large duty to consult for developments within the Treaty 8 area. While this arose in the context of Treaty 8, this case is relevant for consultation in other historic treaty areas across the country particularly the numbered treaties. It underscores that consultation is not determined on a treaty-wide basis in historic treaty areas. It is focused on the Indigenous groups who are exercising Aboriginal and treaty rights in the vicinity of the project and engaged only if these rights may be adversely affected by the Crown approval at issue.

Crown Funding Decisions May Trigger the Duty to Consult

In *Nova Scotia (Aboriginal Affairs) v. Pictou Landing First Nation*, 2019 NSCA 75 the Nova Scotia Court of Appeal held that the province of Nova Scotia needed to consult the Pictou Landing First Nation (PLFN) before making a decision to provide funding to a new effluent treatment facility. This decision highlights the risk that funding decisions for projects that have the potential to adversely impact asserted or established Aboriginal or treaty rights could be found to engage the duty to consult.

The province was already consulting the PLFN on the environmental approvals for the effluent treatment facility but refused the PLFN's request to consult before providing any funding to the project. The Nova Scotia Supreme Court and Court of Appeal rejected the province's position that there was no duty to consult because any funding decision would not itself have an adverse impact on Aboriginal or treaty rights. Instead, the Court of Appeal found that

there was a potential adverse impact and thus the duty to consult was triggered because: (i) a decision to provide partial funding would reduce the likelihood of the pulp mill closing and there was no evidence that the effluent facility would be built without the provincial funding; and (ii) a decision to provide funding would increase the likelihood of ministerial approvals for the pulp mill's continued operation. The Court concluded, among other things, that the provision of funding could influence the Minister's exercise of discretion given that some provincial funds had already been paid with more to come and these funds would be wasted without the ministerial approvals.

The risk that funding decisions for projects could be found to engage the duty to consult will be most important where a funding decision is the only Crown decision relating to the project for a particular government. There are some jurisdictions that are already consulting on government funding decisions where the project at issue would not proceed but for the funding. It is likely that consultation by governments in this area will increase and we anticipate further disputes and court decisions on this topic. The province has sought leave to appeal this decision to the Supreme Court of Canada

Express Authorization From s. 35 Rights Holders Is Required to Claim a Duty to Consult

In *Kaska Dena Council v. Yukon (Government of*), 2019 YKSC 13, the Supreme Court of Yukon addressed the unique question of a society's legal right to bring a representative action.

The Kaska Dena Council (KDC) is a society incorporated in B.C., comprised of members of Kaska Nation ancestry in northern B.C. and Yukon. It was incorporated with the express purpose of negotiating land claims on behalf of its registered members in Yukon and B.C. In the underlying action, KDC applied for a declaration that Yukon breached its duty to consult with KDC in issuing annual sport hunting licenses under the *Yukon Wildlife Act*. Liard First Nation (LFN) is one of four member nations of the Kaska Nation and claims the same territory in Yukon as KDC. It challenged KDC's right to bring the action.

The Court cited several principles from the Supreme Court of Canada to resolve the question of competing claims of entitlement for bringing a duty to consult action on behalf of an Aboriginal group. First, the proper rights-bearing group (or groups) must be identified (per *Tsilhqot'in*). The duty to consult is owed to the Aboriginal group that holds the s. 35 rights, however, an Aboriginal group may authorize an individual or organization to represent it for the purpose of asserting its s. 35 rights. In the absence of evidence of such authorization, the individual or organization purporting to represent the group cannot assert a breach of the duty to consult on their own (per *Behn*). Applying these principles to KDC's claim, the Court held that the proper rights-bearing groups were the four First Nations comprising the Kaska Nation (Liard First Nation, Ross River Dena Council, Dease River First Nation and Kwadacha First Nation). Although KDC was expressly incorporated and authorized to negotiate land claims on behalf of its members in Yukon and B.C., there was no evidence that such authorization extended to allow KDC to bring a claim alleging a breach of the duty to consult. There had also been no transfer of Aboriginal title to KDC by its members, nor any other authorization from the rights-bearing First Nations. Accordingly, the Court held that there was no basis for KDC's claim.

This case provides guidance that there must be evidence of express authorization from the s. 35 rights holders in order for a representative body, such as a society or tribal council, to claim a duty to consult on their behalf. It also confirms that the duty to consult is not necessarily owed to a representative body that purports to represent its membership, including in respect of other matters such as land claims.

Indigenous Evidentiary Matters

Ignace v. British Columbia (Attorney General), 2019 BCSC 10 is a novel decision concerning non-traditional methods of providing Indigenous evidence. The case provides a new precedent to guide the admission of oral and collective Indigenous evidence in future Aboriginal rights and title cases.

In the underlying proceeding, Stk'emlupsemc te Secwepemc Nation (SSN) is seeking declarations of Aboriginal rights and title over lands near the confluence of the North and South Thompson Rivers at Kamloops and Savona, BC, which

also overlap with KGHM's Ajax Mine project. Seeking to rely on oral history evidence at trial to support SSN's claims to Aboriginal title, SSN sought various directions from the Court, including the question of whether SSN Elders could be deposed in a panel or "collective" format, in which multiple witnesses would tender concurrent evidence. In SSN custom, intergenerational oral histories are told in groups, rather than by individuals.

The Court noted its role in balancing the unique nature of Aboriginal rights and title claims with the traditional rules of evidence and procedure. It acknowledged SSN's submission that requiring evidence to be individual in nature is contrary to the historical manner in which Indigenous peoples give their history and pass it on to their descendants. It also noted that the plaintiff in

Aboriginal title and rights cases is the collective, and in this case, such evidence would be led at trial on behalf of the collective. The Court considered the SCC's findings on the application of evidentiary principles in other Aboriginal rights proceedings (e.g. *Mitchell, Delgamuukw*), including the need for flexible rules of evidence to accommodate Indigenous oral histories and to promote truth-finding and fairness. Ultimately, the Court held that it would be a natural and logical development of evidentiary principles to permit panel evidence in Aboriginal rights and title proceedings, when justified by the circumstances. It held that the same flexibility pertaining to the giving of evidence in other cases could be applied to questions of procedure, including depositions.

While the Court allowed panel deposition evidence, it limited the approach by directing that evidence given in a group format should only be permitted if it can clearly be attributable to an individual witness. In this case, one Elder would be permitted to provide deposition evidence as part of a panel, while the evidence of three other Elders should be limited to assisting in telling the oral history in accordance with their communities' traditions and providing translation and word spelling as needed. Further, the Court noted that the trial judge would determine what portion of the deposition evidence could form part of the evidentiary record at trial.

Injunctive Relief Decisions

Irreparable Harm to Aboriginal Rights Outweighs Financial Harms to Mining Company

In *Taseko Mines Limited v. Tsilhqot'in National Government*, 2019 BCSC 1507, the British Columbia Supreme Court found that the potential infringement of Aboriginal rights (particularly involving irreparable habitat disturbance) outweighed the potential economic consequences to a mining company and favoured the granting of an injunction.

Taseko Mines Limited (Taseko) applied for an injunction to prevent members of the Tsilhqot'in Nation (Tsilhqot'in) from blocking access to an area southwest of Williams Lake, B.C., where it intended to carry out an exploratory drilling program (Program) pursuant to a notice of work permit (NOW Permit) in connection with its redesigned New Prosperity Project. In the same hearing, the Tsilhqot'in members sought an interlocutory injunction preventing Taseko from carrying out the Program pending trial of the Tsilhqot'in Nation's action seeking to quash the NOW Permit on the basis that it infringed their established and conceded Aboriginal rights. The Tsilhqot'in had previously obtained an interlocutory injunction enjoining Taseko from proceeding with the Program, although it effectively expired in June 2019.

Applying the *RJR-MacDonald* injunctive relief analysis, the Court rejected Taseko's argument that there was no serious issue to be tried in the Tsilhqot'in's claim because of the relatively small area that would be impacted by the Program, amounting to only 0.04% of the Tsilhqot'in's traditional land. Rather, the Court found that there was sufficient evidence of the Tsilhqot'in's established and conceded rights to fish and gather for social and ceremonial purposes in the specific area in question, and there was a serious issue to be tried that the Program would infringe such rights in an area of unique and special significance. The Court also rejected Taseko's argument that the evidence of harm presented by the Tsilhqot'in was merely speculative, finding that evidence of a rights infringement resulting from exploratory drilling work not yet undertaken is bound to have a speculative quality.

The Court considered irreparable harm and the balance of convenience in one analysis and concluded that the Tsilhqot'in would suffer the greater harm from a refusal

of the injunction. It held that the harm to the Tsilhqot'in resulting from the Program would be irreparable and could not be compensable in damages. The Court pointed to the fact that the environment would never be perfectly restored and a modified environment would not permit the Tsilhqot'in to exercise their Aboriginal rights in the same way as previously. Therefore, it was more compelling to preserve the status quo pending the outcome of trial.

The Court rejected Taseko's argument that it wouldsuffer the greater harm given its concerns that its provincial environmental assessment certificate would expire and could not be further extended if its mine project was not substantially started by January 14, 2020, finding that issue to be moot. The Court held that the NOW Permit could be extended by two years under s. 5(1) of the Permit Regulation, as the process for seeking that extension was essentially mechanical and the Tsilhqot'in would consent to the extension if their injunction were granted. An extension of the NOW Permit to 2022 would allow time for both a trial and for the Program to be completed if Taseko were successful at trial.

Valid Timber Licence Prevails over Unlawful Self-Help Remedies

In *O'Brien & Fuerst Logging Ltd. v. White*, 2019 BCSC 2011, the British Columbia Supreme Court granted an injunction to O'Brien & Fuerst Logging Ltd. to prevent the defendants, members of the Haida Nation, from blocking access to lands in Haida Gwaii where O'Brien held a timber harvesting licence and road permit.

O'Brien's application for an injunction arose after two sets of blockades by the defendants impeding access to the lands in question. O'Brien first redirected its logging activities to other permits, while attempting to reach agreement with the local community. By September 2019, no resolution had been reached and a further blockade was set up. With the timber licence set to expire in March 2020, the Court granted O'Brien's application, emphasizing the unacceptability of self-help remedies that undermine the rule of law, particularly in the absence of any legal challenges to the validity of a licence or permit.

With respect to the first branch of the *RJR-MacDonald* injunction analysis, the Court held that O'Brien had satisfied its onus of demonstrating either a serious question to be tried or a strong *prima facie* case, because it was clear on the evidence that O'Brien had a legal right to access the lands and harvest timber under the licence. The Court also easily concluded that O'Brien would suffer irreparable harm absence an injunction, because of the significant financial loss to the company if the timber licence were to expire, and because O'Brien had no reasonable prospect of recovering damages from the defendants.

On the balance of convenience, the defendants argued that consultation in respect of the granting of the licence had been inadequate. The Court dismissed that concern because neither the defendants nor the Council of the Haida Nation had challenged the validity of the original grant of the licence or any extensions. There was also an absence of evidence for the Court to consider the adequacy of the consultation process and furthermore, the duty to consult rested with the Crown, which was not a party to the proceedings. It was also not clear whether the individual defendants had standing to assert a breach of the duty to consult. Given the absence of any challenge to the timber licence, in the circumstances the balance of convenience favoured O'Brien, which was exercising its lawful rights under a valid and existing licence.

The Court also commented on the appropriateness of issuing an enforcement order as part of the injunction, noting that they are "generally granted where the location of the protest or blockade is remote or hard to access, the number of participants varies from day to day and they are difficult to identify...."[8]

Reliance on Indigenous Law No Defence for Unlawful Blockades

In *Coastal GasLink Pipeline Ltd. v. Huson,* 2019 BCSC 2264, the British Columbia Supreme Court released its decision in connection with Coastal GasLink Pipeline Ltd.'s (CGL) natural gas pipeline project, which will run from near Dawson Creek to LNG Canada's export facility in Kitimat. In granting CGL's application for an interlocutory injunction and enforcement order against blockades, the Court discussed the issue of reconciling Canadian law with Indigenous legal perspectives.

CGL has received all necessary permits and authorizations for project construction. It reached agreements with the elected band councils of the Wet'suwet'en, but the hereditary leadership of the Wet'suwet'en continue to oppose the project. Since 2010, cabins and structures known as the Unist'ot'en Camp, as well as two blockades at strategic access points, were built to manage entry into Wet'suwet'en territory and restrict access to several pipeline routes, including CGL's project. In December 2018, CGL obtained an interim injunction restraining the Indigenous defendants and their supporters from preventing access to the project corridor. A subsequent interlocutory injunction hearing occurred in June 2019.

The Court considered the defendants' assertions that CGL's presence in their un-ceded traditional territory without consent is a violation of Wet'suwet'en law, and that the defendants' blockades and actions were conducted with proper authority under Indigenous law. The defendants also argued that the province was not authorized to grant permits and authorizations for the project without specific authorization from the hereditary chiefs. The Court held that "as a general rule, Indigenous customary laws do not become an effectual part of Canadian common law or Canadian domestic law until there has been some means or process by which" such customary law has been recognized as part of Canadian law, whether through incorporation into treaties, court declarations or statutory provisions. The Court found that while Indigenous laws may be admissible as factual evidence of the Indigenous legal perspective, there has been no process by which Wet'suwet'en customary laws have been recognized as being an effectual part of Canadian law.

The Court also denounced the defendants' self-help remedies, finding that their decision to engage in illegal activities rather than to challenge the project by legal means should not be condoned. While the defendants may sincerely believe in their collective rights to title or ownership of their territories, they were also "entirely aware that the legal rights claimed by them remain outstanding and are at odds with the permits and authorizations granted to" CGL and that such obstruction of lawfully permitted activities is contrary to the rule of law and an abuse of process.

This decision provides important analysis of the parameters and extent to which courts will consider and apply Indigenous laws in their decisions. However, it does little to address the unresolved question of authority in instances where the elected and hereditary leadership of an Indigenous group take opposing positions.

8 *O'Brien* at para. 30.

Article

A Tale of Two Agencies: Getting to know the new Impact Assessment Agency of Canada and Canadian Energy Regulator

Claire Seaborn

"It was the best of times, it was the worst of times…" seems an accurate summary of the Herculean efforts it took to bring Bill C-69 from draft legislation to hold the force of law. As the most amended bill in Canada's history,[9] Bill C-69 reformed Canada's environmental assessment process for major projects, modernized the federal energy lifecycle regulator and introduced new safeguards to navigation and shipping regulation.[10] Despite its political controversy, Bill C-69 passed into law on June 21, 2019 and came into force on August 28, 2019.

While Bill C-69 includes numerous regulatory changes,a key outcome of its passage is the transformation and re-styling of the following two federal regulatory agencies, which are the focus of this article:

- The Impact Assessment Agency of Canada, which replaces the former Canadian Environmental Assessment Agency[11] and is responsible for assessing the environmental, economic, social and health impacts of all federally designated major projects;[12] and
- The Canadian Energy Regulator, which replaces the former National Energy Board[13] and is responsible for overseeing and making decisions with respect to federally regulated energy matters, including the potential impact of energy projects and pipelines on mining operations and minerals.[14]

The Mining Association of Canada played a significant role in the development of and amendments to Bill C-69, particularly in its submissions to parliamentary committees.[15] The mining industry's interest in these regulatory changes were obvious given that mining projects constitute 60% of all federal environmental assessments and routinely have overlapping interests with energy projects.

While it is too early to assess the functioning and success of either the new Impact Assessment Agency of Canada or the Canadian Energy Regulator, the mining industry should be keeping a close eye on the changes to these bodies as set out in the *Impact Assessment Act* and the *Canadian Energy Regulator Act* and how they are implemented.

The Impact Assessment Agency of Canada

The Impact Assessment Agency of Canada (IAAC), like the former Canadian Environmental Assessment Agency, remains a division of Environment and Climate Change Canada that reports to the federal Minister of Environment and Climate Change. The IAAC continues to be headquartered in Ottawa with five regional offices (Halifax, Quebec City, Toronto, Edmonton and Vancouver), and has approximately 400 employees. IAAC is led by an appointed President and an executive team.

As set out in the *Impact Assessment Act*, the IAAC's primary purpose is to conduct or administer the impact assessment process for all federally designed major projects, which are set out in the *Physical Activities Regulations* (widely known as the Project List).[16] Additionally, IAAC's role includes harmonizing of the assessment process across all levels of government, developing policy and monitoring the quality of impact assessments, co-ordinating and engaging in consultation with Indigenous Peoples, and facilitating compliance with all aspects of the *Impact Assessment Act*.

9 Bill C-69 underwent 99 amendments between the Senate's review and the final version of the bill adopted by the House of Commons. Caveat that the Library of Parliament's records on bill amendments only go back to the 19th Parliament in 1940.

10 Bill C-69, An Act to *enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts, Statutes of Canada, 2019* at Chapter 28, online: https://www.parl.ca/DocumentViewer/en/42-1/bill/C-69/royal-assent.

11 Environmental impact assessment was introduced into Canada in 1973 by way of a cabinet decision defining the federal government's first environmental impact assessment policy and establishing the Federal Environmental Assessment Review Office (FEARO). FEARO was replaced by the Canadian Environmental Assessment Agency when the Parliament of Canada passed the first *Canadian Environmental Assessment Act* into law in 1992 (*CEAA, 1992*). *CEAA, 1992* was amended numerous times over the subsequent two decades, with the most substantial overhaul taking place with the passage of the *Canadian Environmental Assessment Act, 2012 (CEAA, 2012)*. *CEAA, 2012* continued the existence of Canadian Environmental Assessment Agency, though modified its objectives, duties, powers and administration.

12 *Impact Assessment Act*, S.C. 2019, c. 28 s. 1.

13 The National Energy Board was established in 1959 under the *National Energy Board Act* to oversee the international and inter-provincial aspects of the oil, gas and electric utility industries and was subsequently amended dozens of times to modify and largely expand its duties and functions.

14 *Canadian Energy Regulator Act*, S.C. 2019, c. 28, s. 10.

15 See the Mining Association of Canada's reports, speeches and presentations available at www.mining.ca

16 *Physical Activities Regulations*, SOR/2019-285. The Project List includes the construction, operation, decommissioning and abandonment of certain types of mines, as well as the expansion of existing mines under certain circumstances. Even if a project is on the Project List, IAAC may still determine that that an impact assessment is not required.

The following is a summary of the key IAAC changes affecting Canada's mining industry.

1. Replaces "environmental" with "impact" assessments

The scheme's most obvious change is replacing the concept of "environmental" assessment to the broader concept of "impact" assessments. Impact assessments draw on the principles of sustainability to include the positive and negative environmental, economic, social and health impacts of a project, as well as impacts on Indigenous Peoples and their rights. While this fundamental change plays roles throughout the new regulatory scheme, it is particularly evident in the broader set of factors to be considered in an impact assessment, which includes "changes to the environment or to health, social or economic conditions;" the cumulative effects within a region, potential alternative means of carrying out a project, Indigenous traditional and community knowledge, and the affects of a project on various diverse groups.

2. Creates early-planning and engagement phase

The new mandatory early-planning and engagement phase begins when a project proponent provides an initial description of a project, which the IAAC then posts publicly on its registry. The result is intended to be an early dialogue about the project with governments, stakeholders, community members and Indigenous Peoples, and an opportunity for the proponent to later provide more detailed project descriptions that respond to or address relevant issues.

3. New legislated timelines

The *Impact Assessment Act* includes new legislated timelines for the early planning and engagement phase (up to 180 days), the impact statement and assessment phases (up to 300 days), and the decision-making phase (up to 90 days). Pursuant to the *Impact Assessment Act* and *Information and Management of Time Limits Regulations*, certain timelines may be extended or suspended by the proponent, the IAAC or the Minister, depending on the circumstances (e.g. co-operation with another jurisdiction, whether the IAAC or a Review Panel is conducting the assessment, and if the proponent requests a suspension).[17]

4. Public and Indigenous participation

The IAAC is administering new funding programs that support individuals, non-profit organizations and Indigenous groups interested in participating in federal impact assessments. While *CEAA, 2012* limited participation to "interested parties," the new regime enables all Canadians to participate in impact assessments.[18] Additionally, the *Impact Assessment Act* provides for public access to information through the creation of the Canadian Impact Assessment Registry and requirements of information to be posted.

5. Reconciliation with Indigenous Peoples

The *Impact Assessment Act* includes explicit requirements to consult and co-operate with Indigenous Peoples before and throughout an assessment, mandatory consideration and protection of traditional Indigenous knowledge and expanded jurisdiction for Indigenous governments to exercise certain powers and participate in policy development.[19] Additionally, the IAAC recently has established an Indigenous Advisory Committee to work on policy and technical guidance on issues of concern to Indigenous peoples.

6. Co-operation with other jurisdictions

The IAAC (and in certain circumstances the Minister and/or the federal cabinet) is responsible for consulting, co-operating and/or developing new agreements or arrangements with other jurisdictions with the objective of achieving "one project, one assessment" wherever feasible. Other jurisdictions may include another federal authority (such as the Canadian Energy Regulator or Canadian Nuclear Safety Commission), provinces, territories, Indigenous governing bodies, foreign governments, international organizations and municipalities.

Now adopted and in force, Canada's leading mining industry associations are calling for the Impact Assessment

17 See the *Information and Management of Time Limits Regulations*, SOR/2019-283. Industry leaders had largely advocated for but did not achieve more certain limits on these timelines, referred to as "hard cap:" "*Bill C-69 Impact Assessment*" Canadian Association of Petroleum Producers (October 2018), online: https://www.capp.ca/wp-content/uploads/2019/11/Bill_C69_Impact_Assessment-326232-.pdf.

18 This change has been the source of significant criticism based on the concern that local community voices will be overshadowed by organizations that are from another region if the country, national or international: Grant Sprague and Grant Bishop, "A Crisis of Our Own Making: Prospects for Major Natural Resource Projects in Canada", *CD Howe Institute* (February 21, 2019), online: https://www.cdhowe.org/public-policy-research/crisis-our-own-making-prospects-major-natural-resource-projects-canada.

19 Critics have expressed concern about these new provisions including ill-defined concepts and failing to clarify obligations surrounding the duty to consult: David Laidlaw, "Bill C-69, the *Impact Assessment Act*, and Indigenous Process Considerations" University of Calgary Faculty of Law (March 15, 2018), online: https://ablawg.ca/2018/03/15/bill-c-69-the-impact-assessment-act-and-indigenous-process-considerations/.

Act's "sound implementation" with the goal of ensuring Canada remains a global competitive jurisdiction that can continue to attract mineral investment. The Prospectors and Developers Association of Canada, Mining Association of Canada and Canadian Mineral Industry Federation acknowledge in a joint statement that this regulatory certainty is a critical determinant of Canada's investment attractiveness.[20]

The Canadian Energy Regulator

The Canadian Energy Regulator (CER), like the former National Energy Board, remains an independent federal energy lifecycle regulator within the portfolio of Natural Resources Canada that reports to the federal Minister of Natural Resources.[21] The CER continues to be headquartered in Calgary with three regional offices (Vancouver, Yellowknife, Montreal) and has approximately 500 employees.

As set out in the *Canadian Energy Regulator Act*, the CER's mandate includes making transparent decisions, orders and recommendations with respect to pipelines, power lines, offshore renewable energy projects and abandoned pipelines. Additionally, the CER oversees, advises and reports on federally regulated energy matters, which includes interprovincial and international trade. While the CER is focused on the energy industry, it has important functions related to mines and minerals, including enforcing laws on the protection of mining operations from pipelines, oil and gas and other energy projects.

The following is a summary of the key CER changes affecting Canada's mining industry.

1. New governance structure

Unlike the former National Energy Board, the CER separates the regulatory agency's oversight, operational and adjudicative functions. The newly appointed Board of Directors is responsible for the CER's oversight, as well as its strategic direction and advice on operations. The Chief Executive Officer, who does not serve on but receives advice from the Board of Directors, is responsible for the day-to-day-operations of the CER. The Commissioners, led by a Lead Commissioner, are the independent adjudicators responsible for the CER's project assessment and decision-making. Additionally, the federal cabinet has authority to provide transparent, high-level policy direction to the CER.[22]

2. Legislated timelines

Where CER Commissioners are to decide whether to issue an Order for smaller, non-designated projects (e.g., reservoirs, compressors, pipelines less than 4 KM), the review timeline is 300 days. Where CER Commissioners are to recommend to the federal cabinet whether to issue a Certificate for larger, designated projects (e.g., pipelines over 40 KM), the review timeline is up to 450 days.[23] These approvals are subject to restrictions protecting mining operations and minerals under the *Canadian Energy Regulator Act*.

3. Public and Indigenous participation

Like the IAAC, the CER has established a participant funding program that facilitates the participation of the public, Indigenous peoples and organizations in public hearings, and the steps leading up to those hearings. Additionally, the standing test has been removed so that any interested Canadians can participate in CER hearings formally or informally.[24]

4. Other Indigenous considerations

The CER's decision-making now requires mandatory consideration of Indigenous traditional knowledge for all decisions, as well as the interests, concerns and rights of Indigenous Peoples when taking a decision on a major pipeline. For example, for a pipeline or power line to occupy on Reserve Land, the consent of the appropriate band council is required.

5. Co-operation with other jurisdictions

The *Canadian Energy Regulator Act* encourages the development of co-operation agreements with other interested jurisdictions, which, while not defined in the

20 "Addressing Canada's Declining Mining Competitiveness," joint statement by the Prospectors & Developers Association of Canada, Mining Association of Canada and Canadian Mineral Industry Federation (July 15, 2019), online: https://www.pdac.ca/communications/press-releases/press-releases/2019/07/15/july-15-2019-(emmc).

21 While the Minister of Natural Resources is likely the responsible Minister, *Canadian Energy Regulator Act* at s. 8 states that the federal cabinet can designate any Minister as the responsible Minister under the Act

22 A minimum of one member of the Board of Directors and one Commissioner must be First Nations, Inuit or Métis.

23 Opportunities to exclude certain time periods are available under the *Circumstances for Excluding Periods from Time Limits Regulations*, SOR/2019-348.

24 Note that the "interested parties" test now exists for public participation in the CER, but not for public participation with the IAAC.

Act, is likely to include the same or similar jurisdictions to those listed in the *Impact Assessment Act*. In certain circumstances, "integrated assessments" with both the IAAC and the CER may be appropriate. An IAAC-CER integrated assessment would begin at the early planning and engagement phase, and be conducted through the Review Panel process under the *Impact Assessment Act* with at least one CER Commissioner sitting on the Review Panel.

In addition to these significant changes, the *Canadian Energy Regulator Act's* section on mines and minerals contains changes for consistency with the CER's new governance structure as well as the regime of distinguishing between Certificates for smaller projects and Orders for larger projects. For example, the *Canadian Energy Regulator Act* prohibits prospecting for mines or minerals lying under a pipeline, or works connected with a pipeline or within 40 meters of a pipeline, unless the conditions of an order allow it. Additionally, the CER's Commissioners may in certain circumstances provide for compensation to be paid to the owner, lessee or occupier of a mining property that is affected by a pipeline.

What Lies Ahead

The Impact Assessment Agency of Canada and the Canadian Energy Regulator now stand as the two most significant federal regulatory agencies when it comes to the development of Canada's natural resources. At the start of this new decade, these agencies are both equipped with governance structures, objectives and responsibilities, as well as revised regulatory regimes to implement.

Controversy surrounding these reforms remain, however, with the most significant threat being the Government of Alberta's reference to the Alberta Court of Appeal on the constitutionality of Bill C-69 and the Project List.25 While the parties' respective arguments will become more clear in the coming months, the Government of Alberta is expected to argue that Bill C-69 encroaches on provincial jurisdiction over natural resources development, whereas the Government of Canada is expected to defend the legislation as falling appropriately within federal jurisdiction.

At least for now, the Impact Assessment Act and the Canadian Energy Regulator Act are here to stay and the speculation surrounding their regimes will likely be clarified as they are implemented.

25 The Government of Alberta officially referred the constitutional questions to the Alberta Court of Appeal on September 10, 2019.

Administrative Law

Kathryn Gullason and Alexis Hudon

9015-3578 Québec inc., 2019 CanLII 4147 (QC CPTAQ)

In this case, the Agricultural Land Protection Commission authorized the use of agricultural land for mining purposes.

The claimant owned agricultural land protected under the *Act respecting the preservation of agricultural land and agricultural activities* (Act). It requested an authorization to sell 58.7 hectares of land and to use 42.8 hectares of land for the non-agricultural purpose of operating a mine of barite and other minerals, which would include a processing and transformation plant. The Municipality of Saint-Fabien supported the request. Rimouski-Neigette County recognized that the request conformed with the objectives of the Land Use and Development Plan. The deposit contained high quality barite and was one of the two largest barite deposits in Quebec. This exploitation was planned to be mainly underground.

The Commission authorized the sale of the properties as they were sufficiently vast to be cultivated on their own. However, it authorized only 4.88 hectares to be used for non-agricultural purposes, on the basis that activities conducted underground do not need to be authorized by the Commission because the Act only protects the surface. The sites required for the exploitation of the mine and the processing of the ore were located in wooded and rugged land, and would not materially impact agricultural activities in the region.

Bloom Lake General Partner Limited/Bloom Lake General Partners Ltd. c. Ville de Fermont, 2019 QCCQ 7326

In this case, the Court of Quebec granted leave to appeal a decision of the Administrative Tribunal of Quebec on the interpretation of "open-pit mine equipment" and "access road" under the *Act respecting municipal taxation* (Act).

Following the partial completion of the appellant's mine expansion, the value of its assessment unit increased from C$180,009,000 to C$318,0009,000. The appellant challenged the value of its assessment unit on the basis that some of its equipment constituted "open-pit mine equipment" and an "access road"under the Act and, as such, should be excluded from the assessment. The Tribunal held that the word "mine" in the term "open-pit mine

equipment" refers to the place where the ore is extracted and not to all mining activities; "mine equipment" refers only to equipment related to the exploitation of ore, whether from an underground or open-pit mine; and "access road" refersto roads giving access to all mine activities.

The appellant sought leave to appeal the decision. First, it claimed that the Tribunal's interpretation of the words "mines" and "exploitation minière" would contradict the intent of the legislator and would have significant consequences on the application of related laws. The appellant also challenged the Tribunal's decision: (i) to use the technical meaning, rather than the ordinary meaning, of the Act's words; (ii) for not distinguishing between the terms "mine" and "excavation;" and (iii) for interpreting the term "access road" without considering the destination of each of these roads (i.e., whether or not the road was intended for one of the mining activities).

The Court remitted the decision to the Tribunal because it is a serious and new matter involving a significant sum. It is also a matter of general interest because it goes beyond the interests of the parties and concerns all municipalities where mines are located.

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

In this administrative law trilogy, the Supreme Court of Canada simplified the standard of review analysis for administrative decisions.

The Court revised the framework for judicial review in two major ways. First, courts must presumptively review all administrative decisions on the "reasonableness" standard unless:

a. the legislature has indicated that a different standard of review should apply, either by: (i) explicitly prescribing the applicable standard of review; or (ii) providing a statutory appeal mechanism; or

b. the rule of law requires that the "correctness" standard apply because the administrative decision raises: (i) a constitutional question; (ii) a general question of law of central importance to the legal system; or (iii) a question related to the jurisdictional boundaries between two or more administrative bodies.

Second, the Court clarified how to apply the "reasonableness" standard. A reviewing court must primarily consider the reasons that an administrative decision-maker provides for his or her decision, rather than the conclusion reached. When reasons are required, the decision must be justified by way of its reasons. Further, even when procedural fairness does not require the decision-maker to provide reasons, the reviewing court must examine the reasoning process underlying the decision.

A reasonable decision is one that is based on internally coherent reasoning that is justified in light of the applicable legal and factual constraints. Some factors to consider are:

a. the governing statutory scheme;

b. other relevant statutory or common law;

c. the principles of statutory interpretation;

d. the evidence before the decision-maker, and the facts that the decision-maker may take notice of;

e. the parties' submissions;

f. the administrative body's past practices and decisions; and

g. the decision's potential impact on the individual to whom it applies.

The *Bell Canada* Decision

This decision provides reasons for two consolidated statutory appeals, one commenced by Bell Canada and the other by the National Football League (NFL), in response to an administrative decision regarding advertising during the Super Bowl television broadcast.

For many years, the Super Bowl was broadcast in Canada with "simultaneous ad substitution" (SimSub). Under SimSub, Canadian advertisements are substituted for American advertisements on American television channels. Therefore, Canadian viewers watching the Super Bowl on American channels would only see Canadian advertisements. Although SimSub is a common practice in Canadian broadcasting, in 2016, the Canadian Radio-television and Telecommunications Commission (CRTC) decided to exclude the Super Bowl broadcast from the SimSub regime. Bell and the NFL sought judicial review of the CRTC's decision.

The Federal Court of Appeal upheld the CRTC's decision. According to the Court, it was reasonable for the CRTC to conclude that it had jurisdiction to make orders targeting specific programs. Further, the CRTC's decision did not conflict with the *Copyright Act* or international law.

The Supreme Court of Canada quashed the CRTC's decision. According to the Court, the statutory appeal mechanism in the *Broadcasting Act* rebuts the presumption of reasonableness; therefore, in such a statutory appeal, all questions of law (including questions regarding statutory interpretation and the scope of a decision-maker's authority) must be reviewed on the "correctness" standard. The Court found that the CRTC exceeded its authority under the *Broadcasting Act* by adding a condition for a television service provider to carry a station that broadcasts the Super Bowl.

The *Vavilov* decision

This decision arose out of a different set of facts and in a different administrative setting.

Alexander Vavilov was born in Canada in 1994; however, unbeknownst to him, his parents were undercover Russian spies. In 2010, his parents were arrested, and were returned to Russia in a "spy swap." Vavilov was subsequently informed by the Canadian Registrar of Citizenship (Registrar) that his Canadian citizenship had been issued in error, and he was not a Canadian citizen.

Vavilov argued that he was a Canadian citizen because he was born in Canada and, under the *Citizenship Act*, persons born in Canada have a presumptive right to citizenship. The Registrar disagreed, citing s. 3(2)(a) of

the *Citizenship Act*, which states that children of foreign government employees are not Canadian citizens, even if born in Canada. Vavilov sought judicial review of the Registrar's decision.

The Federal Court reviewed the decision on the "correctness" standard and found that it was correct. On appeal (even though the Federal Court of Appeal applied the more deferential "reasonableness" standard) the Court of Appeal overturned the decision.

The Supreme Court of Canada upheld the Federal Court of Appeal's decision. The Court found nothing to rebut the presumption of reasonableness review, and held that the Registrar's interpretation of the *Citizenship Act* was unreasonable.

For more on these precedent-setting decisions, see McCarthy Tétrault LLP's blog post entitled "The Supreme Court of Canada simplifies the standard of review analysis in historic Super Bowl trilogy."

Lemire c. Procureure générale du Québec, 2019 QCCS 1842

In this decision, the Superior Court of Quebec refused to invalidate a governmental decree under which the Canadian Malartic Mine (CMM) operates.

CMM has operated near the town of Malartic since receiving permission by government decree in 2009. The decree was adopted following a public consultation. In 2013, CMM notified Quebec's Ministry of Environment of its intention to expand the mine. In 2017, following another environmental impact study and public consultation, the government issued another decree which modified the 2009 decree and allowed the expansion. The 2017 decree replaced the previous standard for noise pollution.

A local resident challenged the decree on the grounds that: (i) the government used its discretionary power for improper objectives by overriding noise concerns; (ii) the process for adopting the 2017 decree was not transparent; and (iii) the decree was unreasonable, in part because the initial noise pollution norm (NI 98-01) was withdrawn in favour of a less demanding one.

The Court rejected all three claims. In doing so, it first noted the high threshold to be met before a court will invalidate a public body's discretionary decision. Courts must control the lawfulness of the decisions, not their appropriateness. The objective of the approval process under the *Environmental Quality Act* is to guide decisions that the government has the discretion to make. It does not impose constraints.

The Court rejected the first claim on the basis that the *Environmental Quality Act* does not require the government to evaluate specific issues, such as noise pollution. Rather, the government may take into account a variety of other environmental aspects. Although noise pollution was a major factor in this case, the fact the government based its decision on other factors was appropriate. The second claim was rejected because the Court found that it was normal for the assessors to be in contact with representatives of the company during the environmental assessment. It was also normal that the assessor's methodology changed throughout the process. The Court rejected the third claim on the ground that it was the government's prerogative to choose a different benchmark for evaluating noise pollution. Although NI 98-01 is widely used in Quebec, it is not legally binding.

Bankruptcy and Insolvency

Kathryn Gullason

Orphan Well Association v. Grant Thornton Ltd., 2019 SCC 5

In this decision, the Supreme Court of Canada held that an insolvent party's environmental obligations take priority over distributions to creditors, including secured creditors.[26]

The Alberta oil and gas licensing regime requires that licensees assume responsibility for end-of-life abandonment and reclamation of their licensed assets. In this case, the bankrupt licensee, Redwater Energy Corporation (Redwater), owned 127 oil and gas assets. Redwater's trustee in bankruptcy, Grant Thornton Limited (GTL), took control of Redwater's 17 most productive wells and related assets, and disclaimed Redwater's unproductive oil and gas assets, including 72 wells. In response, the Alberta Energy Regulator (AER) ordered Redwater to complete the abandonment and reclamation obligations of the renounced assets. GTL refused and, in 2015, AER brought proceedings against GTL.

At the Alberta Court of Queen's Bench and the Alberta Court of Appeal, GTL and Redwater's primary secured creditor successfully argued that the AER's exercise of statutory power under provincial law conflicted with the scheme of distribution under s. 14.06 of the federal *Bankruptcy and Insolvency Act* (BIA). Specifically, s.14.06 of the BIA provides that trustees are not personally liable for: (i) pre or post-bankruptcy environmental conditions, unless they caused such conditions through gross negligence or wilful conduct; or (ii) compliance with environmental orders or directives if they abandon or release any interest in the property within a prescribed time frame.

26 This decision parallels the Court's conclusion in *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60, where successor entities were also held liable for costs arising from past environmental contamination. Please refer to page 48 for the summary of *Resolute*.

In a 5-2 majority, the Supreme Court of Canada overturned the lower court's decision. The Court found that s.14.06 of the BIA is concerned with the personal liability of trustees; therefore, the release of liability under s.14.06 of the BIA does not extend to the bankrupt company's estate. The Court cautioned the AER against attempting to hold trustees personally liable for end-of-life obligations (technically possible under Alberta's *Oil and Gas Conservation Act* and *Pipeline Act*), and stated that if the AER attempted to do so, an operational conflict would occur between the BIA and the Alberta legislation.

The Court also held that the AER can impose conditions on the transfer of a bankrupt company's licenses requiring payment for or performance of end-of-life obligations, and can even do so for wells and other facilities for which no license transfer is being sought.

The Court dismissed the defendants' argument that the AER's orders were "intrinsically financial," such that complying with the orders would conflict with the scheme of distribution under the BIA, which requires secured claims to be paid before unsecured claims. The Court distinguished *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67. In this case, the AER was not a creditor; rather, it was exercising a public duty without any expectation of financial benefit. Further, the Court held that the AER's orders were not provable claims and, therefore, did not interfere with the operation of the BIA.

The effect of this decision is to reinforce the supremacy of the "polluter pays" principle, a tenet of Canadian environmental law which provides that polluters are responsible for remedying the environmental damage they cause.

For more on this decision, see McCarthy Tétrault LLP's *Restructuring Roundup* and *Canadian Energy Perspectives* blog posts entitled "Redwater - SCC Delivers the Final Word" and "Supreme Court of Canada overturns the Alberta Court of Appeal's decision in Redwater," respectively.

Third Eye Capital Corporation v. Ressources Dianor Inc./ Dianor Resources Inc., 2019 ONCA 508

In this decision, the Ontario Court of Appeal developed a framework for determining when it is appropriate to vest out a royalty interest as part of an insolvency proceeding. The decision is the second in a two-part decision of the Ontario Court of Appeal. Part one was discussed in *Mining in the Courts*, Vol. IX.

Dianor Resources Inc.'s main assets were certain mining claims subject to a "Gross Overriding Royalty" held by 2350614 Ontario Inc. (235). After Dianor became insolvent, the receiver sought approval to sell the lands, and requested that 235's royalty interest be vested out. The motion judge approved the sale and vesting order. 235 appealed the decision.

The key issues on appeal were: (i) did the royalty interest constitute an interest in land; and (ii) if yes, did the motion judge have jurisdiction to vest out the royalty interest? In its first decision, (discussed in *Mining in the Courts*, Vol. IX) the Court held that the royalty interest was an interest in land. Subsequently, in this decision, the Court found that it has jurisdiction under s. 243(1) of the *Bankruptcy and Insolvency Act* to grant a sale order vesting property in a purchaser on application by a receiver.

The Court developed a three-stage "rigorous cascade analysis" to determine when vesting is appropriate. First, a court must consider the nature and strength of the interest that is proposed to be extinguished. Second, the court considers whether the interest holder has consented to the vesting out of their interest. Third, if uncertainty remains, the court takes an equitable approach to determine whether vesting is appropriate in the circumstances.

The Court of Appeal applied the cascade analysis to the facts at issue and held that the motion judge erred in granting the order extinguishing the royalty interest. However, due to procedural issues with the filing of 235's appeal, no remedy was granted.

The development of the cascade analysis by the Court provides welcome clarity for the resource sector, and is likely to impact how royalty interests are negotiated and drafted moving forward.

For more on this decision, see McCarthy Tétrault LLP's *Restructuring Roundup* blog post entitled "The Ontario Court of Appeal determines when it is appropriate to vest out a royalty interest as part of an insolvency proceeding."

Class Actions

Kathryn Gullason

Ammazzini v. Anglo American PLC, 2019 SKQB 60

This decision follows two decisions previously discussed in *Mining in the Courts*, Vols. VII and VIII, in which the Saskatchewan Court of Queen's Bench and the Saskatchewan Court of Appeal ordered and upheld a conditional stay of a proposed multi-jurisdictional class action in favour of similar proceedings commenced in Ontario.[27] In this decision, the Saskatchewan Court of Queen's Bench granted the defendants' application for a permanent stay of the Saskatchewan class proceedings.

The class action arose from allegations that DeBeers overcharged consumers for gem grade diamonds by restricting the global supply to inflate prices. Prior to the commencement of the Saskatchewan class action, class proceedings were also commenced in British Columbia, Ontario, and Québec.

After the Saskatchewan Court of Queen's Bench granted the conditional stay, a settlement was reached between the parties to the Ontario, British Columbia, and Québec class proceedings. The settlement agreement provides for

27 Proceedings were also commenced in British Columbia. Decisions regarding the B.C. proceedings, including the certification decision, have been discussed in previous volumes of *Mining in the Courts*. See *Mining in the Courts*, Vol. II, III, V (certification decision), and VI.

a dismissal of the Ontario, British Columbia, and Québec actions, a C$9.4 million payment to the class, and a dismissal or permanent stay of the Saskatchewan class action. In the event that the Saskatchewan Court refused to grant the stay or dismissal, the parties would have the right to terminate the agreement. The agreement was also subject to court approval in Ontario, British Columbia, and Québec, which has since been granted.

To determine whether to grant a dismissal or permanent stay of the Saskatchewan class action, the Saskatchewan Court of Queen's Bench considered the reasonableness of the settlement agreement. The Court concluded that the agreement was reasonable and appropriate because it protected and responded to the needs of the plaintiffs in the Saskatchewan action. The Court found that the Saskatchewan class action was duplicative and unnecessary, and if continued, would amount to an abuse of process. The Court granted a permanent stay (not a dismissal) leaving it open to individual plaintiffs to continue to pursue the action as a regular (non-class) proceeding.

Environnement Jeunesse c. Procureur général du Canada, 2019 QCCS 2885

Litigation is increasingly seen as a way for citizens to hold governments and industries accountable for insufficient measures to mitigate the threats posed by climate change. However, this decision demonstrates the challenges of obtaining authorization to bring climate change class actions in Canada.

In this decision, the Superior Court of Québec considered Environnement Jeunesse (ENJEU)'s application for authorization to institute a class action on behalf of all Québec residents under the age of 35 (as of November 26, 2018) against the federal government. ENJEU alleged that the federal government set inadequate targets for reducing greenhouse gas emissions and failed to meet the targets it did set. Specifically, ENJEU argued that the federal government infringed rights protected under the Canadian *Charter of Rights and Freedoms*, the Québec *Charter of Human Rights and Freedoms,* and the *Canadian Environmental Protection Act*, 1999, including:

1. The right to life, liberty, and security of the person, by "adopting emissions targets that it knows are harmful to human life and health," contrary to the principles of fundamental justice;
2. The right to equality, by disproportionally burdening younger generations with the future costs of climate change; and
3. The right to live in a healthy environment in which biodiversity is preserved, by adopting emissions targets that will result in environmental degradation.

The Court found that ENJEU's allegations were justiciable; however, declined to authorize the class action. According to the Court, ENJEU's decision to cap the age of the class at 35, to exclude millions of other Quebecers due to their age, and to include almost all Québec minors was subjective and arbitrary. Therefore, the proposed class was not a legally constituted group.

For more on this decision, see McCarthy Tétrault LLP's *Canadian ERA Perspectives* blog post entitled "In the Crosshairs: Federal Government Finds Itself at the Centre of Rights-based Climate Litigation in ENvironnement JEUnesse v. Attorney General of Canada."

Kirk v. Executive Flight Centre Fuel Services Ltd., 2019 BCCA 111

This British Columbia Court of Appeal decision highlights the difficulty of certifying common issues in traditional environmental class actions.

The dispute arose after fuel spilled into two rivers in the Kootenay region of British Columbia, and local residents were ordered to evacuate and not use the water. The plaintiff sought to certify a class action on behalf of all persons who owned, leased, rented, or occupied property within the evacuation zone on the date of the spill. The plaintiff claimed property damage, loss of use and enjoyment of property, and diminution of property value. He brought claims in negligence, nuisance, and the rule in *Rylands v. Fletcher*. The chambers judges certified all 13 of the representative plaintiff's common issues, finding, among other things, that: (i) there was an identifiable class; (ii) a class proceeding was the preferable procedure: and (iii) the plaintiff was an appropriate representative plaintiff.

The British Columbia Court of Appeal upheld the certification of certain common issues, including whether the defendants owed (and breached) a duty of care, and whether the defendants had caused the spill or the subsequent issuance of the evacuation or water advisory orders. The Court remitted to the chambers judge the issue of whether the issuance of the evacuation or water advisory orders could, on their own, certify common issues dealing with loss of use or enjoyment.

The Court of Appeal overturned the certification of other common issues, including whether the defendants had caused harm to class members or their properties, punitive damages, and diminution of property value. Regarding property valuation, the Court found that the plaintiff did not sufficiently demonstrate that there was any diminution in value, and provided no credible methodology for appraisal.

As a result of the significant reduction in the number and nature of the certified common issues, the Court remitted the issue of preferability back to the chambers judge for reconsideration, leaving open the possibility that the class action may not be certified after all.

The plaintiff's application for leave to appeal to the Supreme Court of Canada has been dismissed.

For more on this decision, see McCarthy Tétrault LLP's Canadian Class Actions Monitor blog post entitled "Common Issues in Environmental Class Actions."

Conflicts and Jurisdiction

Kathryn Gullason

Araya v. Nevsun Resources Inc., 2019 BCSC 260; 2019 BCSC 262; 2019 BCCA 104; 2019 BCCA 205; and 2019 BCSC 1912

These preliminary decisions relate to the much anticipated trial of a Canadian company for alleged human rights abuses which occurred at a mine in East Africa. This is the first of such claims permitted by Canadian courts to proceed to trial, as discussed in *Mining in the Courts*, Vol. VII.

In 2014, the plaintiffs, three Eritrean nationals, commenced a representative action against Nevsun Resources Ltd. (Nevsun), a B.C. mining company. The plaintiffs claim Nevsun is liable for forced labour, torture, crimes against humanity, and other abuses which allegedly occurred at Nevsun's Bisha Mine in Eritrea. The plaintiffs seek damages under international and B.C. law.

In 2016 and 2017, the British Columbia Supreme Court considered several preliminary applications by Nevsun. The Court determined, among other things, that B.C. is the appropriate forum for the case to be heard, and that the plaintiffs must bring their claims on an individual basis, not as a representative proceeding. Nevsun brought two applications to strike the action based on the act of state doctrine and customary international law. The Court denied both applications to strike, and Nevsun appealed unsuccessfully. Nevsun was then granted leave to appeal to the Supreme Court of Canada, which heard oral arguments regarding the applications to strike on January 23, 2019. The decision of the Supreme Court of Canada is pending, and will likely be relevant to the assessment of risk by Canadian resource companies operating abroad.

In 2019, the British Columbia Supreme Court considered further preliminary applications in this action, and made orders regarding the waiver of solicitor-client privilege and document disclosure. The plaintiffs unsuccessfully appealed some of these orders, and the Supreme Court of Canada denied leave to appeal.

The trial of this action is scheduled to commence on April 1, 2020, for a minimum of six months. Although the plaintiffs will certainly face major obstacles at trial, this case clearly indicates the reluctance of courts to strike novel civil claims against parent entities operating internationally through foreign subsidiaries.

Article

State of the (Carbon) Nation: An Update on Carbon Pricing in Canada

Selina Lee-Andersen

Looking back, 2019 was a pivotal year for carbon pricing in Canada, which saw political and legal battles over the implementation of a national carbon price come to a head. As carbon pricing was rolled out across the country in 2019, voters signaled their support for putting a price on carbon in the October federal election, while the top courts in Saskatchewan and Ontario upheld the constitutionality of the federal carbon-pricing backstop. The discussion over the need to price carbon is taking place at a time when the international community has acknowledged the imperative to reach net-zero emissions by 2050 to avoid the worst impacts of climate change.

Under the Paris Agreement, the Canadian government has committed to reducing its greenhouse (GHG) emissions to 30% below 2005 levels by 2030. Federal and provincial efforts are well underway to implement climate change policy initiatives under the *Pan-Canadian Framework on Clean Growth and Climate Change*, which was released in December 2016. In 2019, the federal carbon-pricing backstop came into force. Under the *Greenhouse Gas Pollution Pricing Act* (GGPPA), the federal carbon-pricing system consists of two components:

- a charge on 21 types of fuel and combustible waste that are consumed within a backstop jurisdiction,[28] which broadly came into effect in April 2019 and is administered by the Canada Revenue Agency; and
- an output-based pricing system (OBPS) that applies to emission-intensive industrial facilities (i.e. facilities with emissions ≥ 50,000 tonnes of carbon dioxide equivalent, or CO2e), which started applying in January 2019 and is administered by Environment Canada and Climate Change.

The federal carbon price currently sits at C$20 per tonne, which will increase annually by C$10 in each of the next three years (on April 1 of each year) until it reaches C$50 per tonne in 2022, at which time the federal carbon price will be reviewed within the context of Canada's progress towards its 2030 target. In its November 2019 report on carbon pricing – *Bridging the Gap: Real Options for Meeting Canada's 2030 GHG Target*[29] – the Ecofiscal Commission modeled various regulatory approaches to enable Canada to achieve its 2030 target in a cost-effective way. The Ecofiscal Commission concluded that carbon pricing will deliver the lowest-cost emission reductions; as a result, carbon pricing should play a central role in Canada's emission reduction strategy. The Ecofiscal Commission went on to say that no matter what policy tools we use to achieve Canada's 2030 target, policies will have to be significantly more stringent than they are today. For example, the regulatory approaches it models require halving the emissions intensity of industrial production by 2030. Also, aggressive new green subsidies would require increasing either taxes or public debt to pay for them. If we rely on carbon pricing to bridge the gap, this will require steadily increasing the carbon price by around C$20 per tonne every year from 2023 until 2030. This represents an increase in the costs of gasoline of about 40 cents per litre relative to today.

Escalating political rhetoric between the federal and certain provincial governments culminated in constitutional challenges to the GGPPA by Saskatchewan, Ontario and Alberta. In 2019, the Courts of Appeal in Saskatchewan and Ontario both rendered opinions that the federal government is within its jurisdiction to impose a national minimum carbon price under the "Peace, Order and Good Government" branch of the Canadian Constitution. These cases are discussed in further detail below.

Top Courts in Saskatchewan and Ontario Uphold Constitutionality of GGPPA

Saskatchewan was the first province to challenge the constitutionality of the GGPPA, when it filed a constitutional reference case with the Saskatchewan Court of Appeal in April 2018. In particular, the province asked the Court of Appeal for a legal opinion on the following question:

> *The Greenhouse Gas Pollution Pricing Act* was introduced into Parliament on March 28, 2018 as Part 5 of Bill C-74. If enacted, will this Act be unconstitutional in whole or in part?

The Saskatchewan Court of Appeal delivered its much-anticipated decision in May 2019, when a 3-2 majority upheld the constitutionality of the GGPPA on the basis that the legislation falls within the scope of the federal government's "Peace, Order and Good Government" (POGG) authority.

28 *Greenhouse Gas Pollution Pricing Act* (S.C. 2018, c. 12, s. 186), Schedule 1: https://laws-lois.justice.gc.ca/eng/acts/G-11.55/page-40.html#h-73.

29 https://ecofiscal.ca/reports/bridging-gap-real-options-meeting-canadas-2030-ghg-target/

By way of background, the GGPPA came into force on June 21, 2018 and sets out the regulatory framework for the federal carbon-pricing backstop system. The purpose of the GGPPA is to ensure there is a minimum national price on GHG emissions to spur emission reductions across the economy. Part 1 of the GGPPA imposes a levy on GHG-producing fuels and combustible waste, while Part 2 implements the OBPS.

Under the *Constitution Act, 1867*,[30] the federal and provincial governments have shared jurisdiction over environmental matters. This means that each level of government can legislate in relation to issues such as GHG emissions, provided that the federal and provincial governments stay within their prescribed areas of authority. Saskatchewan challenged the GGPPA on the following basis:

- The GGPPA imposes taxes in the constitutional sense of the term. While Parliament enjoys broad taxing authority, Saskatchewan argued that the Act is invalid because the Governor in Council determines the provinces in which it operates. As a result, this offends the principle of federalism in that the application of the GGPPA depends on whether a province has exercised its own jurisdiction in relation to pricing GHG emissions to a standard considered appropriate by the Governor in Council.
- The GGPPA runs afoul of s. 53 of the *Constitution Act*, 1867, which requires that taxes be authorized by legislative bodies rather than by executive government (or otherwise).

By way of alternative argument, Saskatchewan submitted that the GGPPA is unconstitutional because it is concerned with property and civil rights and other matters of a local nature that fall within the exclusive legislative authority of the province.

The federal government responded by seeking to uphold the GGPPA as a valid exercise of Parliament's jurisdiction under the national concern branch of its POGG power, which applies to matters of national consequence that have a singleness, distinctiveness and indivisibility clearly distinguishing them from matters coming within provincial jurisdiction. In particular, Canada argued that it should be recognized as having jurisdiction over the "cumulative dimensions of GHG emissions."

A majority of the Saskatchewan Court of Appeal upheld the constitutionality of the GGPPA on the basis that the legislation falls within the scope of the federal government's POGG authority under s. 91 of the *Constitution Act*, 1867. In its decision, the Court took a classic approach to Canadian federalism,[31] which seeks to balance power between the two orders of government in a way that ensures unity (federal order), while allowing for the expression of diversity (provincial order). This is consistent with the approach that is used to manage health and social programs.

While the dissenting judges found that the GGPPA did not meet constitutional requirements, both the majority and dissenting judges agreed that the federal government has the constitutional power to price carbon – where they diverged was the constitutional basis for that federal power. Both the majority and dissenting judges also pointed out that carbon pricing has been proven to be effective and that all levels of government must take action on climate change.

The majority of the Saskatchewan Court of Appeal rejected Saskatchewan's arguments. In particular, it held that the principle of federalism is not a free-standing concept that can override an otherwise validly enacted law. Rather, the Court said that it is value to be taken into account when interpreting the Constitution. On the issue of s. 53, the Court held that Saskatchewan's argument cannot be sustained because, in constitutional terms, the levies imposed by the GGPPA are regulatory charges, not taxes. The Court went on to say that even if these levies were taxes, the GGPPA does not offend s. 53 because Parliament has clearly and expressly authorized the Governor in Council to decide where the Act will apply.

On the issue of POGG, while the Court rejected the federal government's argument on the basis that it would hamper and limit provincial efforts to deal with GHG emissions, the Court held that Parliament does have authority over a narrower POGG subject matter, i.e. the establishment of minimum national standards of price stringency for GHG emissions. By establishing minimum standards of stringency for GHG pricing, the scope and reach of federal power is minimized, thus leaving the provinces with room to tailor GHG legislation to their circumstances. Based on the foregoing, the Court concluded that the GGPPA is "constitutionally valid because its essential character falls within the scope of this POGG authority."

30 https://laws-lois.justice.gc.ca/eng/const/page-1.html

31 Federalism in Canada: https://www.canada.ca/en/intergovernmental-affairs/services/federation/federalism-canada.html

The Ontario government was the next to launch a constitutional challenge of the GGPPA, when it filed a reference case with the Ontario Court of Appeal (OCA) in September 2018. The OCA heard the reference in April, 2019 and released its advisory opinion regarding the constitutional validity of federal legislation on June 28, 2019. The majority of the OCA ruled that the GGPPA is constitutional. In particular, the OCA ruled that the GGPPA is within Parliament's jurisdiction to legislate in relation to matters of "national concern" under the POGG power. The OCA found that given the need for a collective approach to a matter of national concern, and the risk of non-participation by one or more provinces, the federal government is within its jurisdiction to adopt minimum national standards for reducing GHG emissions. The GGPPA leaves ample scope for provincial legislation in relating to climate change and GHG emissions, while narrowly constraining federal jurisdiction to address the risk of provincial inaction. The OCA also ruled that the fuel charges imposed by the GGPPA are regulatory in nature and as such, are not taxes.

Both Saskatchewan and Ontario are appealing their respective Court of Appeal decisions to the Supreme Court of Canada, which will hear both cases in March 2020 as the *Greenhouse Gas Reference*.

In June 2019, Alberta launched its own constitutional challenge of the GGPPA. The Alberta Court of Appeal heard the case from December 16 to 19, 2019. Alberta argued that the federal carbon tax represents a "radical extension of federal powers that violates the Constitution." The five-judge panel of the Alberta Court of Appeal is expected to deliver its decision in the first quarter of 2020.

While the Manitoba government had filed an application for judicial review of the GGPPA in April 2019 (seeking to quash the federal carbon-pricing backstop on the grounds that it exceeds the federal governments' constitutional authority), Manitoba has put its request for a judicial review on hold, pending the Supreme Court of Canada's ruling on the Saskatchewan and Ontario cases.

In response to calls for greater action on climate change from around the world, a wide range of climate change initiatives are being undertaken by global leaders, businesses, non-governmental organizations, and youth climate activists. Given the global commitment to reach net-zero emissions by 2050, the pressure will be on governments, industry and other stakeholders to ramp up efforts and set their sights firmly on achieving the goals of the Paris Agreement.

Constitutional Law

Kathryn Gullason and Jack Ruttle

Attorney General of Québec v. IMTT-Québec Inc., 2019 QCCA 1598

In this decision, the Québec Court of Appeal held that IMTT-Québec Inc.'s transshipment activities at the Port of Québec were not subject to the environmental assessment and discretionary authorization regime under Québec's Environmental Quality Act (EQA). In doing so, the Court clarified the role of precedent when applying interjurisdictional immunity to otherwise valid provincial legislation.

After IMTT built new tanks to increase its transshipment capacity, Québec sought to subject IMTT to the EQA. In response, IMTT argued Québec did not have the jurisdiction to do so because IMTT operated on federal public property and provided services closely integrated with the Port of Québec's activities and, therefore, navigation and shipping in Canada.

The trial judge held that interjurisdictional immunity did not apply due to the lack of a decisive precedent. In overturning this decision, the Court of Appeal made two notable findings.

First, the trial judge had unduly limited the application of interjurisdictional immunity by restricting it only to situations covered by a precedent. The type of statute or regulation is not a material factor when seeking a precedent. Rather, the issue is whether the jurisprudence has identified a protected "core" of the legislative power at issue.

Moreover, courts may identify new "cores" of legislative powers, even if they are hesitant to do so. Here, control over the planning and use of federal public property for a federal purpose was part of the core of federal jurisdiction over federal public property and, therefore, was impaired by the discretionary authorization scheme under the EQA.

Second, an authority seeking to impose an environmental assessment regime must first have the constitutional power allowing it to participate in the decision-making process relating to the project. In this case, Québec did not have this constitutional power.

Although the Court's findings on interjurisdictional immunity were dispositive, it also concluded, in agreement with the trial judge, that federal paramountcy applied to render the impugned sections of the EQA inoperative with respect to IMTT's activities and facilities.

This decision may not be the final word on the role of precedent when applying interjurisdictional immunity, as Québec has sought leave to appeal to the Supreme Court of Canada.

For more on this decision, see McCarthy Tétrault LLP's *Canadian ERA Perspectives* blog post entitled "Constitutional Clarity for Port Operations."

Reference re Environmental Management Act (British Columbia), 2019 BCCA 181

In this decision, the British Columbia Court of Appeal found that legislation proposed by B.C. that would effectively block the Trans Mountain pipeline was unconstitutional, reaffirming Parliament's exclusive authority over interprovincial undertakings.

The proposed legislation prohibits anyone from possessing "heavy oil" in quantities greater than that possessed between 2013 and 2017, *unless* they obtain a discretionary permit from the province. "Heavy oil" is defined in the

Environmental Management Act to mean synthetic crude oil originating outside B.C.

The Court of Appeal found that the proposed legislation specifically targets federal undertakings (pipelines and railways) carrying oil across B.C.'s borders and, therefore, is beyond B.C.'s jurisdiction. According to the Court, unless an undertaking is contained entirely within a province, it can only be regulated under federal jurisdiction. Otherwise, a patchwork of provincial and federal legislation would apply, and the operation of interprovincial undertakings would be stymied.

The Court rejected B.C.'s argument that provinces have a superior claim to legislative jurisdiction over the environment, finding instead that environmental protection is a diffuse field in which both levels of government play important roles. According to the Court, a key component of the federal government's jurisdiction is the minimization of environmental harm associated with interprovincial undertakings. The Court also rejected B.C.'s argument that the constitutionality of legislation establishing a discretionary permitting scheme cannot be evaluated until that discretion has been exercised. The Court of Appeal found that such legislation can and should be evaluated on its face.

B.C. appealed the decision, which was heard by the Supreme Court of Canada in January 2020. The appeal was dismissed from the bench. See 2020 SCC 1.

For more on this decision, see McCarthy Tétrault LLP's *Canadian ERA Perspectives* blog post entitled "BC's Anti-Pipeline Law is Unconstitutional."

Reference re Greenhouse Gas Pollution Pricing Act, 2019 SKCA 40 and *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544

In these decisions, the Courts of Appeal of Saskatchewan and Ontario upheld the constitutionality of the federal *Greenhouse Gas Pollution Pricing Act* (GGPPA). The Supreme Court of Canada is expected to hear appeals from both decisions in January 2020.

The GGPPA came into force on June 21, 2018. The Act sets out the regulatory framework for a federal carbon pricing backstop system, which consists of: (i) a fuel levy; and (ii) an output- based-pricing system for large industrial emitters. The GGPPA only applies to provinces that have not adopted a provincial carbon pricing mechanism that meets the prescribed minimum national standard.

Saskatchewan Constitutional Reference

Saskatchewan challenged the GGPPA on two bases. First, while Parliament enjoys broad taxing authority, Saskatchewan argued that the GGPPA is invalid because the governor-in-council determines where it operates. According to Saskatchewan, this offends the principle of federalism because the application of the GGPPA depends on whether a province has exercised its own jurisdiction in relation to pricing greenhouse gas (GHG) emissions to a standard considered appropriate by the governor-in-council.

Second, Saskatchewan argued the GGPPA runs afoul of s. 53 of the *Constitution Act, 1867*, which requires that taxes be authorized by legislative bodies rather than by executive government (or otherwise). Alternatively, Saskatchewan submitted that the GGPPA is unconstitutional because it is concerned with property and civil rights, and other matters of a local nature that fall within the exclusive legislative authority of the provinces.

In a 3-2 decision, the Saskatchewan Court of Appeal upheld the constitutionality of the GGPPA on the basis that the legislation falls within the federal government's Peace, Order and Good Government (POGG) power. The Court limited the scope of that power to the establishment of minimum national standards of price stringency for GHG emissions, thus leaving the provinces room to develop their own GHG legislation provided it meets the minimum national standard.

Ontario Constitutional Reference

Ontario also brought a constitutional reference challenging the GGPPA. On June 28, 2019, a majority of the Ontario Court of Appeal ruled that the GGPPA is constitutional. The Court held that the GGPPA is within Parliament's jurisdiction to legislate in relation to matters of national concern under its POGG power.

The Court found that the pith and substance of the GGPPA is to establish minimum national standards to reduce GHG emissions. According to the Court, this meets the requirements of "singleness, distinctiveness and indivisibility," because while a province can pass laws in relation to GHGs emitted within its own boundaries, its laws cannot affect GHGs emitted by polluters in other provinces. Further, no one province acting alone, or group of provinces acting together, can establish minimum national standards to reduce GHG emissions. Ultimately, the Court found that a harmonious reading of the GGPPA permits the legislation to operate concurrently with provincial laws applicable to the environment in general, and to the reduction of GHG emissions in particular. The Court also ruled that the fuel charges imposed by the GGPPA are regulatory in nature and as such, are not taxes.

Other Challenges to the GGPPA

Alberta brought a constitutional reference regarding the constitutionality of the GGPPA to the Alberta Court of Appeal in June 2019. The Court heard the reference in December 2019, and the decision is pending. Ontario, New Brunswick, Saskatchewan, and B.C. are interveners in the Alberta reference. B.C. takes the position that the GGPPA is constitutional, while Saskatchewan, Ontario, and New Brunswick take the position that it is not. B.C. and New Brunswick also intervened in the Ontario and Saskatchewan references.

In April 2019, Manitoba filed an application for judicial review of the federal government's decision to implement the GGPPA in the province. The application is ongoing.

For further discussion of the Saskatchewan and Ontario references, see McCarthy Tétrault's Canadian ERA Perspectives blog posts entitled, "View from the Prairies: Saskatchewan's Top Court Upholds Federal Carbon Price & Carbon Policy Update from Alberta" and "Meeting the Minimum (National) Standards: Ontario Court of Appeal Upholds Constitutionality of Federal Carbon Pricing Backstop."

Contracts

Kathryn Gullason

Illidge v. Sona Resources Corporation, 2019 BCCA 89

This decision provides additional reasons to those in *Illidge v. Sona Resources Corporation*, 2018 BCCA 368, which is discussed in *Mining in the Courts*, Vol. IX.[32] In particular, the British Columbia Court of Appeal considered the reasonable time available to a party to satisfy a condition under an option agreement.

In 2002, the plaintiffs granted options to Sona Resources Corporation, a junior exploration and mining company, to purchase several mineral properties. Under the option agreements, Sona was required to complete a bankable-quality feasibility study before it could obtain full rights and title to the properties; however, the agreements did not specify a deadline to complete the study. Over the next 12 years, Sona spent over C$6.4 million exploring the properties, but did not complete the requisite study. In 2014, the plaintiffs commenced an action against Sona, seeking a declaration that the option agreements had lapsed.

The British Columbia Supreme Court held that the study must be completed within a "commercially reasonable period," but that that period had yet to expire. On appeal, the British Columbia Court of Appeal allowed the plaintiffs' appeal, but only to the extent of setting aside a term of the underlying order and replacing it with a term dealing with the reasonable time to complete the study. The Court granted leave to the parties for further submissions on the replacement term.

The Court of Appeal confirmed that the time available to Sona to complete the study, absent a date specified in the option agreements, was a reasonable time. The Court found that a reasonable time to complete the study would be no later than December 31, 2020 (nearly 19 years from the date of the option agreements). A central factor in the Court's determination was the ages of the parties. According to the Court, the mutual intentions of the parties would not have allowed for option agreements that took the owners into old age.

32 The preceding British Columbia Supreme Court decision, *Illidge v. Sona Resources Corporation*, 2017 BCSC 1326, was discussed in *Mining in the Courts*, Vol. VIII.

Criminal

Kathryn Gullason

R. v. Pavao, 2018 ONSC 4889

This is the sentencing decision for a case discussed in *Mining in the Courts*, Vol. IX, in which an individual was found guilty of fraud in relation to the sale of shares in gold mining companies.

Mr. Carlos Pavao convinced 10 unsophisticated investors to purchase shares in two gold mining companies: Rubicon Minerals Corporation and Africo Resources Ltd. However, Mr. Pavao never had access to the shares he purported to sell. The investors paid over C$1.1 million into Mr. Pavao's numbered company, but received nothing in return. Mr. Pavao also encouraged the investors to bring in their friends and relatives, which many of them did. Meanwhile, Mr. Pavao acquired real shares in the mining companies and earned a profit. The Ontario Superior Court of Justice found Mr. Pavao guilty of 10 counts of fraud against the individual investors and one count of defrauding the public.

The Court sentenced Mr. Pavao to five years on each of the 11 counts, to be served concurrently, and C$1,100,799 in restitution, to be paid within eight years.

The Crown submitted that the appropriate sentencing range was three to eight years. The Court disagreed with defence counsel that Mr. Pavao should be sentenced at the lower end of the range, noting that the principles of deterrence and denunciation required a significant sentence in this case. The aggravating factors supporting a higher sentence included the extent and duration of the fraud; the nature and vulnerability of the victims; the devastating impact on many of the victims; the motivating force of greed; and the fact that Mr. Pavao had knowingly sold fake shares in real mining companies, while simultaneously making a profit by acquiring the real shares. Finally, given Mr. Pavao was relatively well-off, and many of the investors were retirees with no way of recouping their losses, the Court found that it was fair to order restitution for the full amount invested by each of the victims.

Defamation

Kathryn Gullason

Northwest Organics, Limited Partnership v. Fandrich, 2019 BCCA 309

This British Columbia Court of Appeal decision demonstrates the importance of context when determining whether allegedly defamatory statements have a defamatory meaning. In particular, depending on the context, even statements that otherwise engender feelings of dislike or disesteem may not have a defamatory meaning.

The plaintiffs purchased a farm near Lytton, B.C., in order to build and operate a commercial composting facility. The defendants (comprised of community members and a non-profit society) became concerned over the potential adverse environmental and health impacts of the proposed facility. A heated public debate followed, with the plaintiffs and the defendants each publishing a series of reports, flyers, and other statements criticizing the other party's position. The plaintiffs sued the defendants in defamation and unlawful interference with economic interests, alleging that the defendants' defamatory statements had delayed the opening of the facility and harmed its profitability. The trial judge dismissed the plaintiffs' claims. The plaintiffs appealed.

The British Columbia Court of Appeal affirmed the trial judge's finding that the statements did not have a defamatory meaning, and dismissed the plaintiffs' appeal. According to the Court, assessing whether words have a defamatory meaning requires considering all the circumstances of the case, including any reasonable implications the words might have, the context in which the words were used, the audience to whom the words were addressed, and the manner in which the words were presented. In this case, although the statements at issue might have engendered feelings of dislike or disesteem, they were part of the general debate about the composting facility and had to be considered within this broader context.

For more on this decision, see McCarthy Tétrault LLP's *Canadian Appeals Monitor* blog post entitled "Keeping Things in Context: B.C. Court of Appeal Considers the Roles of Context and Public Debate in Defamation Cases."

Enforcement of Judgments and Awards

Kathryn Gullason

Richmont Mines Inc. v. Teck Resources Limited, 2018 BCCA 452

In this decision, the British Columbia Court of Appeal reversed a decision granting leave to appeal an arbitral award. The decision illustrates the limited scope for appellate review of commercial arbitration awards.

Richmont Mines Inc. is the successor in interest to certain mineral claims in northwestern Ontario. Teck Resources Limited is the successor in interest to a 2% royalty over gold produced from those mineral claims. A dispute emerged between Teck and Richmont in relation to what percentage of the gold produced was subject to the royalty. In order to resolve the dispute, the parties went to arbitration. The arbitrator ruled in favour of Teck, finding that the royalty extended over 100% of the gold produced from the mineral claims. Richmont was granted leave to appeal the arbitral award pursuant to s. 31 of the province's Arbitration Act. Teck appealed the decision to grant leave.

The key issue before the Court of Appeal was whether the order granting Richmont leave to appeal raised an extricable question of law as required by s. 31(1) of the *Arbitration Act* and, if it did, whether there was arguable merit to the question of law as required by s. 31(2) of the Act.

The Court of Appeal held that the chambers judge erred in accepting that the errors identified by Richmont in its leave application constituted extricable questions of law. Richmont claimed that the arbitrator erred in law by failing to correctly interpret the defined term "property" in an agreement, and by ignoring a certain piece of evidence. The Court found that the error regarding the interpretation of the term "property" at best raised a question of mixed fact and law, if not a question of fact alone. Regarding the allegation that the arbitrator ignored evidence, the Court found that even if the arbitrator did ignore evidence, it did not affect his decision in a material way.

This decision highlights the desire of courts to ensure that arbitration remains an alternate dispute mechanism, and not merely another layer of litigation.

Yaiguaje v. Chevron Corp., 2019 CanLII 25908 (SCC)

In the final chapter of this ongoing litigation regarding enforcement of an Ecuadorian judgment against Chevron Canada, the Supreme Court of Canada dismissed the plaintiffs' application for leave to appeal. Prior decisions in this case are discussed in *Mining in the Courts*, Vols. VI, VIII, and IX.

In 2011, the plaintiffs obtained a US$9.5 billion Ecuadorian judgment against Chevron Corp. for environmental damages related to Chevron's operations in the country. Chevron had no assets in Ecuador, therefore, the plaintiffs sought to enforce the judgment in the U.S. After a New York Court found the judgment to be invalid, the plaintiffs attempted to enforce the judgment in Ontario against Chevron Canada, a seventh-level subsidiary of Chevron. The defendants relied on the principle of corporate separateness, arguing that it prevented the plaintiffs from accessing Chevron Canada's assets to satisfy a judgment against Chevron. The defendants' motion was granted. The plaintiffs appealed to the Ontario Court of Appeal.

The Court of Appeal dismissed the appeal and rejected the plaintiffs' argument that it ought to be entitled to pierce the corporate veil on "just and equitable grounds."

The concurring minority found that while just and equitable grounds for piercing the corporate veil might exist, such grounds were not available to the appellants in the circumstances. The plaintiffs sought leave to appeal to the Supreme Court of Canada to clarify when a "just and equitable ground" may exist to pierce the corporate veil. The Supreme Court of Canada dismissed the plaintiffs' application for leave to appeal.

As a result of this jurisprudence, corporations with Canadian-based assets whose related entities are operating abroad should have some comfort that the law of corporate separateness has not been disturbed.

For more on this decision, see McCarthy Tétrault's *Mining Prospects* blog posts entitled "The Supreme Court of Canada denies leave to appeal the Ontario Court of Appeal's decision not to pierce the corporate veil in Yaiguaje v. Chevron" and "Yaiguaje v. Chevron Corporation - The Ontario Court of Appeal Does Not Pierce the Corporate Veil, but the Concurring Minority Questions the Principle of Corporate Separateness."

Article

Everything Old is New Again: Amendments to *Fisheries Act* Come into Force and a Closer Look at the Independent Auditor's Report on Protecting Fish from Mining Effluent

Selina Lee-Andersen and Meghan Bridges

On August 28, 2019, certain provisions of the new *Fisheries Act* (Act) came into force, including new protections for fish and fish habitat in the form of standards, codes of practice, and guidelines for projects near water. The amendments to the Act are aimed at restoring what the federal government has described as "lost protections" to fish and their habitat and incorporating "modern safeguards" in those protections. The fisheries protection and pollution prevention provisions of the *Fisheries Act* remain in force until the new Fish and Fish Habitat Protection and Pollution Prevention Provisions set out in *An Act to amend the Fisheries Act and other Acts* are brought into force. The Department of Fisheries and Oceans is developing a public registry for authorizations under the Fisheries Act, which is expected to be in place in 2020.

Last year also saw the release by the Commissioner of the Environment and Sustainable Development (the Commissioner) of Report 2 – *Protecting Fish From Mining Effluent* (the Report). The Report, which was tabled in Parliament on April 2, 2019, summarized the results of an audit of federal regulatory programs designed to protect fish and fish habitats from mining effluent. Environment and Climate Change Canada (ECCC) and Fisheries and Oceans Canada (DFO) are the two federal bodies tasked with protecting fish and fish habitats and whose programs were subject to the audit. The Commissioner determined that while ECCC and DFO are generally achieving their goals, steps can be taken by each body to improve monitoring, inspections, reporting, and risk analysis.

Overview of Key Amendments to the *Fisheries Act*

The *Fisheries Act* is the primary federal statute governing fisheries resources in Canada and contains provisions to protect fisheries and fish habitats and prevent pollution from any source. The 2019 amendments to the *Fisheries Act* resulted from a process launched by the federal government in October 2016, when the Minister of Fisheries and Oceans asked the House of Commons Standing Committee on Fisheries and Oceans (the Committee) to review changes to the Act made in 2012 by the government of then-Prime Minister Stephen Harper. The Report of the Fisheries and Oceans Committee on the *Fisheries Act* review, entitled *Review of Changes Made in 2012 to the Fisheries Act: Enhancing the Protection of Fish and Fish Habitat and the Management Of Canadian Fisheries*, was released on February 24, 2017 and made 32 recommendations to the government. In June 2017, the government released its *Environmental and Regulatory Reviews Discussion Paper*, which outlined potential reforms and proposed, among other things, that "lost protections" be restored in the Act. Bill C-68 was introduced by the federal government on February 6, 2018, which proposed certain amendments to the *Fisheries Act*. On June 21, 2019 the new *Fisheries Act* received royal assent.

Under the amendments, the scope of the Act is increased to cover all fish, rather than being limited to commercial, Indigenous, and recreational fisheries, which the Act previously covered. The government also reintroduced the pre-2012 prohibition on the "harmful alteration, disruption or destruction of fish habitat," which was also known as "HADD." With the reintroduction of HADD, the concept of "serious harm to fish" was removed from the Act. Precisely what constitutes HADD was uncertain under the pre-2012 Act case law. On August 28, 2019, DFO published "measures to protect fish and fish habitat", which is essentially a list of steps that, when implemented, will avoid causing the death of fish and harmful alteration, disruption or destruction of fish habitat. Whether these measures will resolve any of the uncertainty under the old case law remains to be seen.

The pollution provisions in s. 36, which prohibit the deposit of deleterious substances, have not changed. This section has long created a scientifically questionable prohibition on the deposit of any substances deemed to be "deleterious" without any regard to their quantity or the actual receiving environment.

Impact of the Amendments to the *Fisheries Act*

The following amendments to the Act will likely have the greatest impact on the design, construction, and operation of mining and other projects going forward.

Protecting Fish and Fish Habitat

The federal government has restored the prohibition against "harmful alteration, disruption or destruction of fish habitat" and against causing "the death of fish by means other than fishing." In addition to restoring these old prohibitions, the amendments to the Act introduce a new requirement to make information on project decisions public through an online registry. The amendments creating this public registry are not yet in force, but will be set out in ss. 42.2 through 42.5. As noted above, DFO is developing a public registry for authorizations under the Act, which is expected to be in place in 2020.

Better Management of Projects

New regulations accompanying the Act define which projects will always require ministerial permits before a project can begin. Projects that will always require ministerial permits are now called "designated projects" and are identified based on their potential impact on fish and fish habitat. It is expected that designated projects will typically be larger-scale projects. Currently, which projects require authorization under the Act is determined on a project-by-project basis rather than being subject to a general rule. DFO believes that the concept of a "designated project" will provide greater certainty around process and timelines. DFO's current practice of issuing letters of advice and ministerial authorizations will continue for projects that are not caught by the definition of "designated project."

Standards and Codes of Practice

DFO has published standards and codes of practice designed to assist proponents with complying with the fish and fish habitat protection provisions of the Act if they are not able to completely implement the "measures to protect fish and fish habitat." The purpose of the standards and codes of practice is to serve as formal guidance for small, routine projects in order to avoid the need for permits or authorizations.

Restoring Habitat and Rebuilding Fish Stocks

In order to create more stable and resilient aquatic ecosystems and support the sustainability of fish stocks, DFO is now required to consider whether proposed development projects give priority to the restoration of degraded fish habitats. Once the public registry comes online, companies will be required to create and publish habitat restoration plans on the registry if an area has been designated as ecologically significant and requires habitat restoration. DFO has also been given the ability to create regulations related to the restoration of fish habitat and the rebuilding of fish stocks, although no such regulations have come into force to date.

Reconciliation with Indigenous Peoples

The federal government has stated that the changes to the Act will help to advance reconciliation with Indigenous peoples by, among other things: (i) requiring consideration of traditional knowledge for habitat decisions and adverse effects on the rights of Indigenous Peoples when making decisions under the Act; (ii) enabling agreements with Indigenous governing bodies to carry out the purposes of the Act; and (iii) introducing a modernized fish habitat protection program to enhance partnering opportunities with Indigenous communities regarding the conservation and protection of fish and fish habitat.

The amendments also include a new requirement to consider cumulative effects, along with increased regulatory powers to amend, suspend, or cancel authorizations.

Commissioner's Report on Protecting Fish From Mining Effluent

As noted above, the *Fisheries Act* contains provisions to prevent pollution from any source, including mining activities. Non-metal mines, such as potash, coal, and oil sands, are not permitted to release any effluent containing harmful substances into a body of water where fish are present. Metal and diamond mines are subject to the *Metal and Diamond Mining Effluent Regulations*, which allow them to emit effluent containing harmful substances under some conditions.

ECCC administers and enforces the pollution prevention provisions of the *Fisheries Act* and its regulations, including the *Metal and Diamond Mining Effluent Regulations*. Mining companies must submit plans to compensate for the loss of fish habitat that results from mining, and both ECCC and DFO must approve the plans before granting authorizations to deposit mine waste or begin construction. DFO monitors implementation of the plans.

The audit on which the Report is based covered the period from January 2009 to November 2018. It follows a previous report issued in 2009, which determined that ECCC and DFO could not demonstrate that they adequately protected fish habitats. The audit reviewed several aspects of the regulatory scheme governing mining effluent, and the Commissioner made a number of recommendations, including those set out below.

Fish Habitat Compensation Plan

Both ECCC and DFO require companies to submit fish habitat compensation plans before granting them authorizations to deposit mine waste or begin construction. The Commissioner found that more than half of the construction-related compensation plans approved by DFO missed some detailed measures to address the loss of fish and fish habitats. In addition, DFO monitored 90% of the compensation plans for new construction work, but only 60% of the compensation plans for those that used existing bodies of water. The Commissioner recommended that DFO ensure that all fish habitat compensation plans

include detailed measures to address the loss of fish and fish habitats, and monitor implementation of the plans. This recommendation is consistent with the recent amendments to the *Fisheries Act* and the renewed focus on all fish and fish habitats.

Inspections of Metal Mines

ECCC tracked inspections by company name rather than mine site, and conducted inspections in Ontario with much less frequency than any other region – an average of once every 3.6 years, compared to the national average of 1.5 years. The Report also found that 35% of mines did not provide complete information on effluents. While enforcement officers reviewed figures that exceeded set limits for particular substances, they did not review figures below the set limits, nor did they systematically review laboratory analysis results. The Report recommended changes to address each of these concerns.

Inspection of Non-Metal Mines

ECCC inspected non-metal mines much less frequently than metal mines: on average, once every 2.4 years compared to every 1.5 years respectively. While the ECCC had previously identified the need for a risk-based strategy for inspection of non-metal mines, such a strategy was never developed. The Commissioner recommended that ECCC conduct a full risk-based analysis of non-metal mines to determine inspection priorities, conduct inspections based on this analysis, and track enforcement activities by type of mine.

Enforcement

From April 2014 to June 2018, mining companies were required to pay C$16.6 million in penalties to ECCC under the Fisheries Act. Individual penalties ranged from C$10,000 to C$7.5 million, with a recent trend toward larger penalties. The data on penalties was tracked by company rather than by site. The Report recommended that ECCC begin to track data by mine site in order to better understand compliance at individual sites. The Report also recommended introducing additional enforcement measures, such as permitting enforcement officers to issue fines, tickets, or administrative monetary penalties. DFO has said that its Conservation and Protection branch will participate in an ECCC-led working group that will consider whether additional enforcement measures would better address violations of the *Metal and Diamond Mining Effluent Regulations*. The target date for this action is the end of September 2020.

The federal government has accepted the recommendations set out in the Report. ECCC has indicated that it intends to develop options to address the issues flagged in the Report, with target completion dates in 2020 and 2021. In addition, DFO has acknowledged the shortcomings identified by the Commissioner and is targeting April 2020 for implementation of a revitalized monitoring program for tailings impoundment areas.

Environmental Law

Kathryn Gullason and Alexis Hudon

Cenovus TL ULC v. Alberta (Energy), 2019 ABQB 301, 2019 ABQB 301

In this decision, the Alberta Court of Queen's Bench dismissed Cenovus TL ULC's application for judicial review after the Alberta Department of Energy (Alberta Energy) denied Cenovus' applications to participate in a provincial royalty regime.

To encourage development of the oil sands industry, the government of Alberta adopted a royalty approach whereby the province shares the risk of developing an oil sands project by taking a minimal royalty until the project reaches payout. The royalty regime allows operators to apply to Alberta Energy for approval of an Oil Sands Royalty (OSR) project under the *Oil Sands Royalty Regulation*.

Cenovus applied twice, in 2015 and 2016, for approval of its Telephone Lake Project as an OSR project. Both applications were denied. As a result, Cenovus brought an application for judicial review, claiming that Alberta Energy's decisions to deny approval were unreasonable.

The Court dismissed Cenovus' application for judicial review and found that Alberta Energy's decisions were within the range of acceptable outcomes. According to the Court, Alberta Energy's decision-making process was procedurally fair. Alberta Energy made it clear why it was rejecting the applications and repeatedly requested information from Cenovus to alleviate its concerns that the project was not moving forward quickly enough. Further, the Court held that Alberta Energy's reasons, while sparse, were adequate and clearly explained why Cenovus' applications were denied.

This decision demonstrates that courts are unlikely to interfere with a province's decision to deny a benefit under a provincial regime.

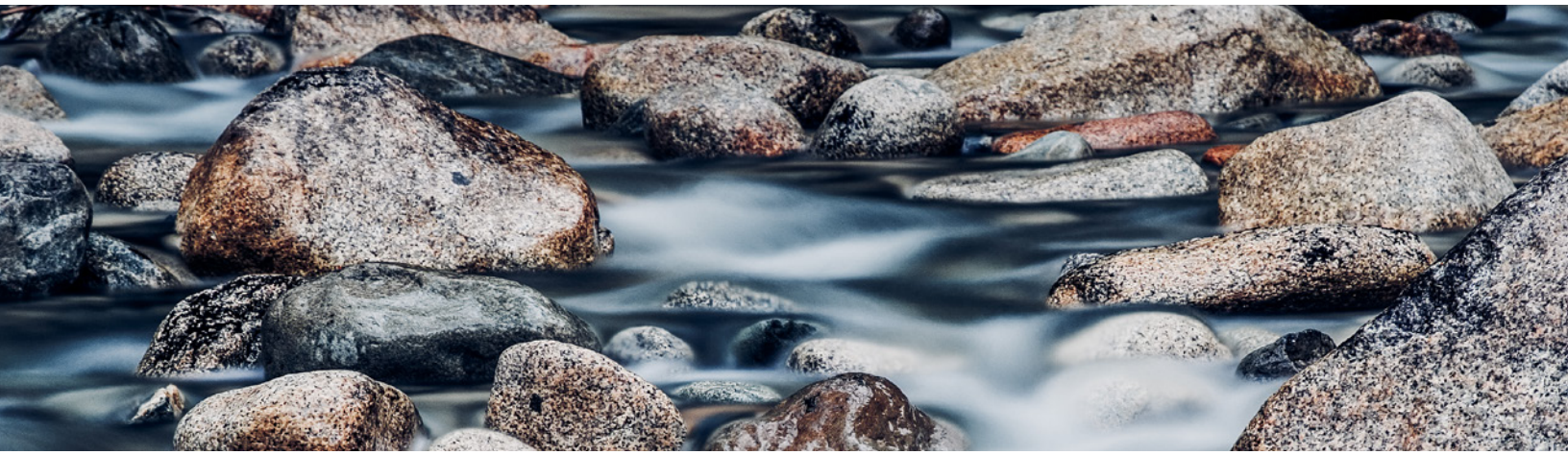
Directeur des poursuites criminelles et pénales c. Forage Frontenac (1995) inc., 2019 QCCQ 11

In this decision, the Court of Quebec held that although Forage, a drilling contractor, had emitted contaminants into the environment, it had been sufficiently diligent so as to not violate the *Environment Quality Act* (Act).

On June 3, 2013, in Disraeli, Quebec, a blast in a quarry caused rock fragments to land on properties one kilometre away from a quarry blast and create holes in the ground. An experienced representative of Forage maintained that nothing had indicated that the rock would be projected beyond what Forage had contemplated, and claimed to have acted in accordance with regulations and industry best practices to ensure public safety.

To prove that Forage committed the infraction under s. 20 of the Act, the prosecutor had to show that Forage released a contaminant into the environment, and that such release was likely to affect human life, health, safety, security, well-being or comfort, cause damage, or otherwise harm soil quality, vegetation, wildlife or property.

The Court found that the stones projected during a blasting activity could be considered a contaminant, and that the projection of stones and stone chips caused damage to property and affected the safety of people living near the quarry. However, the Court held that Forage had been sufficiently diligent. In the circumstances, the contaminants were released despite Forage taking all necessary precautions to avoid violating the Act. Forage acted in accordance with best practices and industry standards. During the visit of Forage's expert to the quarry shortly after the blasting, no perceptible anomalies were found. No other precautions could have been implemented to avoid rock projections. The obligation to be diligent is an obligation of means, not of result, and does not require perfection.



Ontario (Environment, Conservation and Parks) v. Henry of Pelham Inc., 2018 ONCA 999

In this decision, the Ontario Court of Appeal overturned the lower court's decision and imposed the mandatory minimum fine against Henry of Pelham Inc. (HPI) for a first-time water pollution offence under the *Ontario Water Resources Act* (OWRA).

In 2014, a St. Catharines resident reported to the Ministry of the Environment and Climate Change that a pond on his property had turned black. The creek that led into the pond ran through a vineyard owned by HPI. Upon investigation and discussion with HPI, the company indicated it was possible that cattle manure and grape pomace had entered the creek

through a tile drain. HPI was charged with, and pleaded guilty to, an offence under s. 30(1) of the OWRA, which prohibits the discharge of any material into any water that may impair its quality or the quality of any other waters.

Although offences under s. 30(1) of the OWRA are subject to a mandatory minimum fine of C$25,000, the trial judge relied on s. 59(2) of the *Provincial Offences Act* (POA) to impose a fine of only C$600. Section 59(2) of the POA allows trial judges to provide discretionary relief if imposing a minimum penalty would be "unduly oppressive or otherwise not in the interests of justice." On appeal, the Ontario Court of Justice increased the fine to C$5,000.

The Ontario Court of Appeal allowed the Crown's second appeal, and imposed the mandatory minimum fine of C$25,000. The Court found that the circumstances surrounding HPI's offence were not sufficiently "exceptional" to warrant departing from the minimum fine. It held that the discretionary authority under s. 59(2) of the POA must be only exercised under truly exceptional circumstances, otherwise the goal of deterrence of public welfare legislation would be undermined. According to the Court, relief under the "unduly oppressive" category is normally limited to individuals, thus, corporations seeking relief from a minimum fine will likely only be able to do so under the residual "interests of justice" category.

Although this decision was decided under Ontario legislation, it provides helpful commentary on minimum fines in the regulatory context.

For more on this decision, see McCarthy Tétrault LLP's *Canadian ERA Perspectives* blog post entitled "Minimum Relief from Minimum Fines Ontario (Environment, Conservation and Parks) v. Henry of Pelham Inc., 2018 ONCA 999."

Resolute FP Canada Inc. v. Ontario (Attorney General), 2019 SCC 60

In this decision, the Supreme Court of Canada interpreted a 1985 indemnity agreement to hold successor companies liable for historic environmental contamination.[33] The Court held two forest-product companies, Resolute FP Canada Inc. and Weyerhaeuser Company Limited, responsible for the costs of remedial work at a waste site in Northwestern Ontario.

In the 1960s, a pulp and paper mill operated in Dryden, Ontario. The mill bleached paper using a process that involved mercury, which flowed downstream and caused harm to the health of local residents, including members of the Grassy Narrows and Islington First Nations. In the mid 1970s, Great Lakes Forest Products sought to purchase the mill property and entered an indemnity agreement with the government of Ontario to ensure that the mill remained operational. Under this agreement, the province agreed to cover the costs of past pollution above C$15 million. Meanwhile, the Grassy Narrows and Islington First Nations commenced litigation in respect of the mercury contamination, which settled in 1985. Following the settlement, the province granted a new indemnity agreement for the contamination to Reed Ltd., Great Lakes Forest Products, and their successors and assigns (1985 Indemnity Agreement).

Twenty-six years later, Ontario's Ministry of the Environment issued a remediation order under s. 18 of the *Environmental Protection Act* for environmental monitoring and maintenance at the former mill site. Ownership of the property had changed hands several times, therefore, the remediation order was issued against Bowater (which later became Resolute) and Weyerhaeuser.

Weyerhaeuser sought a declaration from the Ontario Superior Court of Justice that the 1985 Indemnity Agreement required the province to cover the costs of complying with the remediation order. Resolute intervened. The motions judge granted summary judgment in favour of Weyerhaeuser and Resolute. On appeal, the Ontario Court of Appeal agreed that the 1985 Indemnity Agreement applied to the remediation order. However, the Court held that the decision only applied to Weyerhaeuser since Resolute had assigned its benefit under the agreement.

33 This decision parallels the Court's conclusion in *Orphan Well Association v. Grant Thornton Limited*, 2019 SCC 5,, where a successor entity was also held liable for costs arising from past environmental contamination. Please refer to page 23.

At the Supreme Court of Canada, the majority of the Court (by a narrow margin of 4-3) overturned the lower court's decision and held that the 1985 Indemnity Agreement did not apply to the remediation order. The majority's key findings included the following:

- The 1985 Indemnity Agreement only indemnified claims brought by "third parties." Since the province was a party to the agreement, it was not a third party.
- The 1985 Indemnity Agreement was intended to only indemnify "pollution claims" (a term defined in the agreement), which the remediation order was not. The remediation order required monitoring and maintenance to prevent further pollution; it was not intended to address ongoing pollution.
- The 1985 Indemnity Agreement must be considered within the context of previous indemnities and the settlement with the Grassy Narrows and Islington First Nations. The context indicates that the agreement should apply more narrowly; it was not intended to shield against regulatory compliance.

This decision is significant for potential purchasers of properties with ongoing contamination issues. Purchasers should verify the scope of pre-existing indemnity agreements which, after the Court's decision, may only cover third-party claims and not include the costs of regulatory compliance.

Although this decision clarified the interpretation of the 1985 Indemnity Agreement, it may not be the last word on this dispute. Resolute has stated that it will appeal the remediation order to the Ontario Environmental Review Tribunal.

For more on this decision, see McCarthy Tétrault LLP's *Canadian ERA Perspectives* blog post entitled "Supreme Court of Canada finds two forest-product companies must pay for remedial work."

Expropriation

Kathryn Gullason

Atlantic Mining NS Corp. (D.D.V. Gold Limited) v. Oakley, 2019 NSCA 14

In this decision, the Nova Scotia Court of Appeal determined which losses are compensable when a real property owner is displaced by expropriation.

In 2012, Atlantic Mining expropriated Wayne Oakley's residential property. The Nova Scotia *Expropriation Act* (Act) authorizes compensation for the market value of the expropriated lands and "the reasonable costs, expenses and losses arising out of or incidental to the owner's disturbance." The parties agreed that the market value of the property was C$305,000, but could not agree on the other disturbance losses.

Mr. Oakley claimed non-pecuniary losses for things such as anxiety, disquiet, and inconvenience. Atlantic argued that the definition of disturbance losses under the Act does not include non-pecuniary losses. The Utility and Review Board (Board) agreed with Mr. Oakley, and awarded the maximum statutory amount of 15% of the market value of the property for economic and non-pecuniary disturbance losses. Atlantic appealed.

The Nova Scotia Court of Appeal allowed the appeal, and reduced the award to 2% of the market value. The main issue on appeal was whether disturbance losses, as defined by the Act, include non-pecuniary losses.

The Court reviewed the Board's decision on a standard of reasonableness,[34] and concluded that the Board's interpretation of "losses" as non-pecuniary and virtually unlimited was unreasonable. The Court noted that no Canadian court has described disturbance losses as non-pecuniary in nature. Because the interests protected under the Act are proprietary, not personal, the compensation paid for expropriation must relate to the ownership and enjoyment of property. In this case, the original award went beyond even what the common law would award an accident victim in tort. According to the Court, this interpretation of the Act "transcend[ed] the common law in a way neither authorized nor contemplated by the statute."

34 This decision predates the Supreme Court of Canada's decision in *Bell-NFL-Vavilov,* where the Court revised the standard of review analysis. Please refer to page 18 for the summary of *Bell-NFL-Vavilov.*

Article

Is the Risk of Workplace Impairment Enough to Constitute Undue Hardship?

Ben Ratelband, Justine Lindner and Marco Fimiani

By its very nature, mining is a safety-sensitive industry. It is both a legitimate objective and legal obligation for employers in the mining industry to provide a safe workplace. Impairment in the workplace poses a risk to safety, and while it is a risk in all workplaces, the risk is heightened in safety-sensitive environments. Recognizing the heightened risk that impairment poses to their workplaces, some mining companies use drug and alcohol testing to address safety concerns arising from substance usage. In fact, many companies already have policies and programs for different types of testing, such as reasonable cause or post-incident testing. One of the more controversial forms of testing is the use of random drug and alcohol testing.

Concern regarding workplace impairment has increased with the recent legalization of recreational cannabis. However, Canadians have had legal access to medicinal cannabis for almost 20 years. Many Canadian employers are already well-versed in balancing their duty to protect worker health and safety under applicable occupational health and safety legislation with the duty to accommodate (on a case-by-case basis) under applicable human rights legislation.

When balancing these duties, one of the first questions that tends to arise is whether the employee was impaired at work (i.e. the worker's level of "current impairment" while on the job). The issue that employers may face with this is that some arbitrators and human rights tribunals have held that it is unreasonable to impose random testing on employees where the testing does not relate to risks caused to workplace safety by current impairment.[35] For example, in *Teck Coal Ltd. and USW, Local 7884, Re,* the arbitrator stated "…. use by itself, as opposed to impairment, cannot constitute cause or justification for requiring an employee to attend on an addictions specialist for assessment and treatment."[36] When it comes to cannabis and drug use more generally, employers have struggled to justify their policies and programs where testing technologies for cannabis or other drugs do not measure current impairment.

However, two recent decisions – while not mining cases – suggest a potential shift in the way that some arbitrators and human rights tribunals have looked at this issue. They suggest that testing technologies relied upon by employers in safety-sensitive workplaces do not need to measure current impairment, because the risk of potential impairment may be sufficient justification for disciplinary measures. They lend support for the proposition that the unacceptable risk of cannabis impairment may constitute undue hardship. More specifically, absent an available means or method for accurately testing impairment from drug use, the duty to accommodate (assessed on a case-by-case basis) may not require an employer to accept the risks of potential impairment from drugs in safety-sensitive environments.

> *International Brotherhood of Electrical Workers, Local 1620 v Lower Churchill Transmission Construction Employers' Association Inc.,* 2019 NLSC 48

In this decision, the Supreme Court of Newfoundland and Labrador upheld an arbitral decision that an employer's duty to accommodate did not extend to allowing an employee to work in a safety-sensitive position following medical cannabis use if the employee's current impairment cannot be ascertained.[37]

The employee, a general labourer on a project for the delivery of electricity from Muskrat Falls in Labrador to the island of Newfoundland (Project), suffered from chronic pain due to Crohn's disease and osteoarthritis. After a referral from his family doctor, the employee was prescribed medicinal cannabis. He consumed about 1.5 grams of cannabis by vaporization each evening following work.[38]

The employee's work on the Project overlapped with his prescription cannabis use until his eventual layoff. Despite the collective agreement containing priority hiring for vacant positions, the employee was not successful in obtaining a position because of concerns over whether his cannabis use would impair his ability to perform the job safely.[39] The employee's union filed a grievance alleging that the refusal to hire him was discriminatory.

At arbitration, the arbitrator assessed the competing expert evidence with respect to the effects of cannabis and the potential duration of impairment. Ultimately, the arbitrator decided that the employer's inability to measure and manage the risk of harm constituted undue

35 *Entrop v. Imperial Oil Ltd.*, [2000] O.J. No. 2689 at para. 99, 189 D.L.R. (4th) 14 (ONCA).

36 *Teck Coal Ltd. and USW, Local 7884, Re,* [2018] B.C.C.A.A.A. No. 6 (BC LA), at para. 378.

37 *International Brotherhood of Electrical Workers, Local 1620 v Lower Churchill Transmission Construction Employers' Association Inc.*, 2019 NLSC 48, at paras. 43-47 ("*Lower Churchill*").

38 *Lower Churchill* at para. 10.

39 *Lower Churchill* at para. 14.

hardship. Specifically, the arbitrator stated that undue hardship, in terms of unacceptable increased safety risk, would ensue if the employer put the grievor to work. The arbitrator provided that "if the employer cannot measure impairment, it cannot measure risk."[40]

The employee's union filed an application for judicial review. On judicial review, the Supreme Court of Newfoundland and Labrador decided that the arbitrator's decision was within the range of reasonable outcomes and dismissed the employee's application. The Court reiterated the arbitrator's finding that the duty to accommodate did not extend to a requirement that the employer accept a risk resulting from the possibility of impairment.[41] Specifically, the Court stated that the arbitrator reasonably concluded that:

- impairment can last up to 24 hours after use;
- the impairing effects may not be known to the user;
- the use of marijuana can impair the ability of a worker to function safely in a safety-sensitive environment; and
- there was no available means or method for accurately testing impairment from cannabis use in the workplace.[42]

This decision is currently the subject of an appeal.

Everitt v Homewood Health Inc., 2019 AHRC 36

In this decision, the Human Rights Tribunal of Alberta addressed the accommodation of an individual who used medicinal cannabis in a safety-sensitive workplace. In dismissing the individual's complaint, the Tribunal offered support for the notion that the unacceptable risk of cannabis impairment may be sufficient to constitute undue hardship.

The complainant, a heavy consumer of cannabis for approximately 25 years and a member of a building trade union in the construction industry, alleged that the respondent discriminated against him when it refused to register him in the Rapid Site Access Program (RSAP). It is a voluntary program that provides pre-qualification to workers on safety-sensitive sites. Site owners agree to waive Pre-Access Tests for RSAP-participant workers with active dispatch status, in exchange for RSAP-participant workers passing an enrolment drug and alcohol test and agreeing to be subject to random drug and alcohol testing while at work. Workers who do not qualify for RSAP or who do not wish to participate in RSAP are equally eligible for jobs on safety-sensitive sites, but must go through the traditional Pre-Access Test in order to obtain site access.[43]

The complainant took the enrolment test but tested over RSAP allowable limit for tetrahydrocannabinol (THC), a psychoactive constituent of cannabis. The complainant's test result showed over 1200 nanograms per millilitre. The threshold for a positive test was 50 nanograms per millilitre. Based on his test result, the complainant was denied enrolment in RSAP.[44]

Ultimately, the Tribunal dismissed the complaint because the complainant did not meet his burden of proof, did not establish that his disability was a factor in the respondent's refusal to enrol him in RSAP, and noted that even if his disability was a factor in the respondent's refusal to enrol him, the respondent could not have accommodated the complainant without incurring undue hardship.[45]

In reaching its conclusion, the Tribunal was not satisfied on the balance of probabilities that the complainant required cannabis to treat his disability. The Tribunal was troubled by evidence from the complainant's doctor that it was his practice to authorize every patient who requested a medical authorization for cannabis unless there was a reason not to do so. In light of this, the Tribunal found that there was little support that the doctor reasonably and objectively believed that cannabis was the appropriate treatment for the complainant's disability.[46] In any event, the Tribunal held that there was no discrimination because it was reasonable and justifiable for the respondent to determine eligibility for enrolment in RSAP without conducting an individualized assessment.[47] Additionally, given the nature of RSAP as a voluntary, streamlined and alternative process for pre-qualifying workers to enter onto safety-sensitive work sites, the respondent could not accommodate the complainant absent undue hardship.[48]

40 *Lower Churchill* at para. 43.
41 *Lower Churchill* at para. 44.
42 *Lower Churchill* at para. 42.
43 *Everitt v. Homewood Health Inc.,* 2019 AHRC 36, at paras. 2-3 ("*Everitt*").
44 *Everitt* at para. 75.
45 *Everitt* at para. 6.
46 *Everitt* at para. 39.
47 *Everitt* at para. 45
48 *Everitt* at para. 64.

The Tribunal also held that the complainant's cannabis use posed an unacceptable safety risk in the circumstances.[49] The expert witnesses agreed that cannabis is an impairing substance. They also agreed that impairment is extremely difficult to assess and that the impairing effects of cannabis can vary depending on a number of factors.[50]

Here, the Tribunal looked at the complainant's heavy levels of consumption and was concerned that 1200 nanograms per millilitre would be a common level of THC for the complainant. In addition, the complainant was authorized to possess 600 grams of cannabis, which was significantly in excess of the Health Canada guideline of 150 grams.[51] The Tribunal also took into account the fact that the granting doctor's evidence was not reliable or of assistance for determining whether the complainant could safely work on safety-sensitive sites. Specifically, not only did the doctor not have a full medical history or a complete medical file from the complainant's long-term treating physician, the doctor also failed to consider a job-demands analysis for the work that the complainant would be performing.[52]

Lastly, the Tribunal rejected the complainant's argument that he was safe to work while consuming cannabis because he had procured work in the past and had not had a workplace accident. The fact that the complainant had not had a workplace accident did not mean that he was not a risk. Rather, it simply meant that he had not had an accident and the unacceptable safety risk remained.[53] In all, the Tribunal was satisfied that the complainant posed an unacceptable risk if he were to be dispatched as an RSAP-participant worker.

Conclusion

The *Lower Churchill and Everitt* decisions may serve as persuasive authority for cases on the issue of the risk of workplace impairment and undue hardship in the mining industry. In particular, in the absence of the means or methods to measure impairment, and depending on the individual facts and circumstances of each case, the unacceptable risk of potential cannabis impairment in safety-sensitive industries may constitute undue hardship such that the employer is relieved from the duty to accommodate.

49 *Everitt* at para. 67.
50 *Everitt* at paras. 73-74.
51 *Everitt* at para 75.
52 *Everitt* at para 77.
53 *Everitt* at para 78.

Labour and Employment

Ben Ratelband, Justine Lindner, Marco Fimiani, Gabrielle Schachter, Lindsay Burgess and Alexis Hudon

Boissonnault c. Iamgold Corporation, 2019 QCCA 361

In this case, the Quebec Court of Appeal upheld a trial decision rejecting the claims of past employees for royalties.

Iamgold is engaged in the exploration and exploitation of mining deposits. The appellants were employees of Cambior Inc., which merged with the Iamgold in November 2006. In 1994, while employed by Cambior, the appellants found a gold deposit in Peru. Under Cambior's *Ore Discovery Bonus Plan*, the extent to which the appellants would benefit from their discovery depended on whether it was subsequently exploited. After the merger of Iamgold and Cambior, the bonus plan was terminated. In 2011, Iamgold sold the gold deposit without profit to Rio Alto Inc., which then profitably exploited the deposit. The appellants sought payment of certain bonuses under the plan.

The trial judge held that the bonus plan established three distinct bonuses, corresponding to three steps in the development of a commercial exploitation: (i) the board of directors' acceptance of a pre-feasibility study; (ii) the board's decision to launch production on the basis of a profitability study, which requires evidence of economic viability at such time; and (iii) the start of commercial production. The appellants claimed that the operation by Rio meant that the third condition was met. The trial judge disagreed, finding that the plan required that Cambior exploit the deposit. Moreover, the benefit granted by the plan was not a real right or a security interest that guaranteed the payment of the bonus regardless of who owned the deposit.

In upholding this decision, the Court of Appeal agreed that the rights the appellants claimed did not exist under the plan. The Court also rejected their claim that Iamgold acted in bad faith when it sold the deposit. The sale took place because Iamgold was unable to profitably exploit the deposit, and there was no obligation to preserve any potential rights of the appellants at the time Iamgold transferred its assets.

North American Mining Inc. and IUOE, Local 955 (Healey), Re (2018), [2019] A.W.L.D. 135 (Alb. Arb.)

This arbitration involved a grievance filed by a union in respect of the termination by North American Mining Inc. (NAMI) of one of its employees for not wearing a seatbelt and tampering with a safety device.

The grievor was employed by NAMI as an operator of the large dump trucks known as haul trucks at a mine site. A foreman at the site witnessed the grievor operating a haul truck without wearing a seatbelt. The foreman took the grievor to an on-site office where he was interviewed by the superintendent. In the interview, the grievor maintained that he was wearing his seatbelt. The vehicle was then inspected. Upon inspection it was noted that the belt was twisted and jammed into the slot at the top of the device in a deliberate manner. NAMI then determined that the grievor had not only failed to wear a seatbelt, but that he had also tampered with it. The issue of tampering with the seatbelt "elevated" the seriousness of the grievor's breach of the applicable policies and procedures and he was terminated from employment. The union filed a grievance.

At arbitration, NAMI maintained that termination was justified due to the safety-sensitive nature of the workplace and the clearly communicated expectations that employees who refuse to comply with safety rules will face discipline up to and including dismissal. In particular, the

issue of seatbelt safety was emphasized by NAMI after two serious accidents where injuries were aggravated because of a failure to wear seatbelts. The union submitted that no discipline was justified because the grievor was wearing his seatbelt. In the alternative, the union argued that if the arbitrator found the grievor was not wearing his seatbelt, then termination was still too severe and not in line with progressive discipline. The union provided evidence of another employee who was disciplined for the same breach eight months after the grievor's termination. This employee was not terminated but rather given a written reprimand as discipline.

The arbitrator concluded that the grievor was not wearing his seatbelt, or alternatively was only wearing his lap belt, and that he had disabled the retracting device.

The arbitrator found that the foreman and superintendents' account of events was more credible than that of the grievor. The arbitrator further stated that while there was no "specific penalty" in the collective agreement for the failure to wear a seatbelt, he would normally uphold the dismissal given the safety-sensitive nature of the environment. However, the arbitrator decided *not* to uphold the dismissal in this case because of the disparity between the written reprimand provided to the other employee and the grievor's termination. Given the breakdown of the working relationship, the arbitrator did not order the grievor to be returned to the workplace and instead awarded damages in lieu of reinstatement, in an amount determined by the parties.

R. v. Orbit Garant Drilling Services Inc., 2018 ONCJ 935

This decision was an appeal by Orbit Garant Drilling Services Inc. (Orbit) of two convictions under s. 25(2)(h) of the *Occupational Health and Safety Act (Ontario)* (*OHSA*) for failing as an employer to take every precaution reasonable in the circumstances for the protection of workers.

Orbit provides drilling services in the mining industry. On June 14, 2014, the company had teams (comprised of one "driller" and one "runner/helper") drilling in a heavily forested area in northern Ontario. On its drive back from the drill site to the mine site, the team took an alternative trail to see if it would be a viable route between the two locations. The trail was not approved by Orbit for safe passage, nor was the runner allowed to ride in the bulldozer, a machine designed to convey a single operator. On the drive back, a dead tree (chicots) fell and killed the runner while he was getting out of the bulldozer that he and his partner were riding in. Orbit was charged and convicted under s. 25(2)(h) of OHSA for failing to ensure that: (i) the chicots on or near the travel way providing access to a workplace were removed; and (ii) a safe means of egress from a workplace was provided to workers. Orbit appealed the two convictions.

On appeal, the Court found no palpable and overriding error with respect to the trial judge's finding on the *actus reus* of the offence and concluded that Orbit's workplace conditions posed a hazard. The Court also held that Orbit's position – that the worker's own "error or negligence" should preclude the finding of *actus reus* – did not apply in this case as it was impossible to separate the fatality from the analysis. While the Court entertained the notion that there might be a case where the employee's own error, misconduct, or negligence is so "glaring, inexplicable, and unexpected" that it is beyond

the employer's "influence and responsibility," it held that this case was not one of them.

Orbit's due diligence argument also failed. In particular, Orbit failed to establish, on a balance of probabilities, that it had an objectively reasonable but mistaken belief that the travel path was safe and secure from hazardous chicots or that the conditions of the trail were a mere nuisance, and that all reasonable steps in the circumstances were taken. The policy prohibiting multiple persons from riding in a single-operator vehicle was a red herring, as the employee died while he was getting out of the vehicle. Furthermore, there was a lack of qualified personnel trained to supervise, identify and handle hazardous chicots, which detracted from due diligence.

The appeal against the convictions was dismissed, but count one was conditionally stayed. The appeal judge varied the fine to C$175,000 on the basis that it would be disproportionate to maintain the fine apportionment for the chicots as a reflection of Orbit's culpability in relation to the fatality because of the worker's decision to explore the unapproved trail and its connection to causation on the first count.

Teck Coal Ltd. and IUOE, Local 115 (Taylor), Re, 2019 CarswellBC 1317, 139 C.L.A.S. 221 (B.C. Arb.)

This arbitration involved a grievance filed by a union in respect of the dismissal by Teck Coal Limited (Teck) of one of its employees for evading a random drug test required by a Return to Work Agreement (RTWA).

Teck employed the grievor as a journeyperson plant operator. The grievor had previously been terminated from his employment with Teck for failing a post-incident drug test in which he tested positive for THC metabolites. He was offered rehiring on the condition that he take steps to demonstrate a drug free lifestyle. The RTWA signed by the grievor provided that he was to undergo unannounced drug and alcohol testing in addition to any other testing carried out under the terms of Teck's Drug and Alcohol Policy.

On September 27, 2018, the grievor presented himself for his scheduled night shift and his supervisor told him that he needed to take him to the gatehouse. Upon hearing that he needed to go to the gatehouse, the grievor said that he was feeling sick, he had been sick all day and that he had a headache. He then went to use the restroom and, after some time had passed, left the building without advising his supervisor or scanning out of the work site. The grievor then phoned his supervisor from his home, and was advised by his supervisor that he needed to come back to the gatehouse. The grievor did not return to work and instead drove to a hospital emergency room where he was diagnosed with a multifactorial headache and discharged with one pill – a muscle relaxant – for a headache. Later that evening, the grievor emailed his supervisor and informed him that when he went to the washroom he vomited and had diarrhea, and that he was still not well and unable to return to work for his shift. On October 1, 2018, the grievor

was suspended pending an investigation. The grievor attended a disciplinary investigation meeting on October 10, 2018, following which his employment was terminated.

Dismissing the grievance, the arbitrator found that the grievor's termination was warranted given: the nature of the position, the trust that an employer must place in its employees, the grievor's lack of candour and deception, his lack of remorse, and his past disciplinary record. The arbitrator concluded that the grievor did not have a reasonable excuse to refuse to take the test. The arbitrator was further satisfied that this was an incident warranting discipline as the grievor failed to comply with the random testing requirement in his RTWA. The grievor left the processing area knowing that he was required to attend the gatehouse for a random drug test. After leaving, he did not follow scan protocol, fabricated reasons for leaving the site, and did not return to the gatehouse when ordered to do so.

Shareholder Rights and Remedies

Kathryn Gullason

2538520 Ontario Ltd. v. Eastern Pltinum Limited, 2019 BCSC 1446

In this decision, the British Columbia Supreme Court dismissed a petition seeking leave to commence a derivative action due to the petitioner's prior dealings with the company.

Eastern Platinum Limited (EPL) entered into a series of contracts for the re-mining and processing of mine tailings at its South African platinum and chrome mine (Retreatment Project), which had been in care and maintenance from 2013 to 2018. The goal of the Retreatment Project was to recover marketable product from stored tailings. The petitioner, a shareholder in EPL, sought leave to commence a derivative action against a number of EPL's current and former directors. The petitioner alleged negligence and breach of the defendants' fiduciary duty to EPL in relation to the approval of the Retreatment Project. According to the petitioner, all the benefits of the Retreatment Project would flow to another contracting party, leaving EPL insolvent.

The British Columbia Supreme Court dismissed the petition. Although the Court found that the proposed action satisfied the "best interests" requirement of the test for leave, it ultimately found that the petitioner did not bring the claim in good faith. The Court looked at the petitioner's prior dealings with EPL, which included a failed bid by the CEO of the petitioner to gain control of EPL. As a result, the Court found that the petitioner's action was motivated by personal interests and, consequently, failed to satisfy the requirement of good faith.

First Bauxite Corporation (Re), 2019 BCSC 89

In this decision, the British Columbia Supreme Court approved a public mining company's plan of arrangement which would allow it to cease to be a reporting issuer and dismissed an oppression proceeding commenced by its minority shareholders.

In November 2018, First Bauxite Corporation (FBX), a public mining company with shares listed on the TSX Venture Exchange, began the process of seeking court approval for a plan of arrangement (Arrangement) which would allow FBX to go private. A group of minority shareholders (Founders) opposed the Arrangement and commenced a separate oppression action seeking: (i) a declaration that the Arrangement would be unfairly prejudicial to them; and (ii) an order prohibiting FBX from proceeding with the Arrangement. In response, FBX argued that its two majority shareholders (holding over 90% of the Common Shares) supported the Arrangement, and that the Founders did not exercise their dissent rights under the Arrangement, which would have allowed them a process to fairly advance their valuation grievances.

The Court approved the Arrangement and dismissed the Founders' oppression action. The Court noted that a going-private transaction involving a public company is not in itself oppressive; an oppression claim requires wrongful conduct, causation, and compensable injury, none of which occurred in this case. Furthermore, the Court held that the majority shareholder had the reasonable expectation that, after complying with all appropriate corporate and securities requirements, the Arrangement would be assessed on its merits and not be derailed by "disgruntled" minority shareholders who did not exercise their dissent rights.


72.33 72.35
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21.80 21.85
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950.46 950.70
33.09 33.10
126.31 126.33
164.17 164.28
140.89 141.07
71.92 71.93
147.44 147.45
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23.13 23.14
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Article

Obviousness is an "Inherently Factual" Inquiry: the *Packers Plus* Appeal

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

Every year, intellectual property cases dealing with technology in the oil and gas sector, and the Alberta oil patch specifically, are decided in the Federal Courts. These decisions continually readjust the benchmark for what technology companies can and should protect by obtaining patents. Once protections are in place, natural resource companies should hire experienced counsel to develop a successful, efficient trial strategy for any patent litigation.

Here, we provide an overview of the recent appeal decision in *Packers Plus Energy Services Inc. v. Essential Energy Services Ltd. (Packers Plus)*.[54] In this case, the Court of Appeal affirmed the Federal Court's finding that the patent at issue was obvious, and that obviousness is a question of fact. Since there was evidence before the trial court to support its decision on obviousness, the Court of Appeal refused to intervene.

Patent at Issue

Packers Plus Energy Services Inc.'s (Packers Plus) patent claimed a hydraulic fracturing (fracking) method to control the flow of the high-pressure fracking fluids into the oil-bearing shale formation (the ball-drop method). First, the fluids are injected in the inner "pipe string." Then, ports are operated to allow fluid to pass from the pipe string out into the surrounding well bore. Opening particular ports placed along the pipe string allows fluid to be released into specific segments of the well bore. The well bore is separated into segments by packers.

Packers Plus was the first company to use the patented method in open-hole wellbores (wellbores without a concrete casing to maintain the shape of the wellbore).[55]

Trial Decision

At trial, the Federal Court held that the claims at issue were obvious. The Federal Court found that neither the ball-drop method nor its use in an open-hole wellbore was inventive.[56]

On the question of whether the invention was obvious, Packers Plus argued that the operator would not have foreseen various problems in using the ball-drop method in open-hole wellbores. However, the Court held that these problems were a function of the particular geological formation rather than an alleged invention.[57] The skilled person, knowing the features of the formation, would have chosen the appropriate tools from the prior art[58] and, in reality, little effort was required to develop the alleged invention.[59]

Packers Plus' commercial success – used to support the argument that the invention was not obvious – was discounted because it was not caused by the invention. Rather, any commercial success was driven principally by rising commodity prices that had made fracking more economical and commonplace.[60] Market fluctuations and changes in commodity prices should be considered and explained when making this argument about your innovative technology.

Essential Energy Services Ltd. (Essential Energy) argued that it would have been obvious to try the ball-drop method in an open-hole wellbore. Traditionally in patent law, this argument only applies in industries where experimentation is a component of developing new technology. In this case, the Federal Court doubted whether the obvious-to-try test applied to the oil and gas industry, but nevertheless decided that the invention was obvious to try.[61] This conclusion by the Federal Court potentially establishes that this argument can generally be made with respect to oil and gas technology.

Appeal Decision

On appeal, Packers Plus alleged a number of errors on the part of the Federal Court. The appeal court held that most of these allegations were impermissible invitations to reweigh the evidence before the Federal Court. The Court of Appeal rejected the invitation, holding that, absent an extricable error of law, obviousness is a finding of mixed fact and law. A finding of obviousness should therefore be reviewed only where the Federal Court decision contains a "palpable and overriding error."[62] There was evidence

54 *Packers Plus Energy Services Inc. v. Essential Energy Services Ltd.*, 2019 FCA 96 [*Packers Plus* FCA].
55 *Packers Plus* FCA at para. 7.
56 *Packers Plus* FCA at para. 14.
57 *Packers Plus* FCA at para. 15, citing *Packers Plus Energy Services Inc. v. Essential Energy Services Ltd.*, 2017 FC 1111 at para. 192 [*Packers Plus* FC].
58 *Packers Plus* FCA at para. 15, citing *Packers Plus* FC at para. 191.
59 *Packers Plus* FCA at para. 14.
60 *Packers Plus* FCA at para. 16, citing paras. 193-94.
61 *Packers Plus* FCA at paras. 14, 18, citing paras. 198-200.
62 *Packers Plus* FCA at para. 29.

before the Federal Court to support each aspect of its decision, and therefore no basis to intervene.[63]

First, the Court of Appeal affirmed the Federal Court's description of the use of the "common general knowledge" of the person skilled in the field to which the patent relates (the Skilled Person). The common general knowledge encompasses "information that is not specifically mentioned in the prior art, but would have been known to the skilled person at the relevant date."[64] The prior art encompasses scientific articles, textbooks, patents and other sources of information in the field. The Skilled Person may use their common general knowledge "to understand or augment the relevant prior art in assessing the gap between it and the invention."[65]

In this case, the common general knowledge added only one element not found in the prior art: the specific packer types useful in an open-hole wellbore.[66] The Court found that the Skilled Person, in this case an engineer with two to five years of field experience, would have known the type of packers to use even though it was not explicitly stated in the prior art.

Second, Packers Plus argued that the common general knowledge excluded certain prior art accepted by the Federal Court and suggested that the "prior art" was not relevant to the obviousness analysis.[67] The Court of Appeal rejected this argument and confirmed that "obviousness requires comparison of the inventive concept of the claim(s) at issue and the relevant prior art, as augmented by or understood through the prism of the skilled person's common general knowledge."[68]

Earlier this year, the Federal Court in *Aux Sable Liquid Products LP et al. v. JL Energy Transportation Inc.*[69] determined that the "prior art" that is citable for obviousness is the same prior art that is also citable for anticipation.[70] Aux Sable, represented by McCarthy Tétrault LLP, successfully argued that the prior art does not have to be locatable by a reasonably diligent search to be citable for obviousness.[71] Though the Court of Appeal cites the Federal Court's application of the "reasonably diligent search" test,[72] the Court of Appeal did not consider the question of whether it was necessary. In any event, nothing turned on this question since the prior art was deemed to be locatable upon a reasonably diligent search.

Third, Packers Plus argued the Federal Court had imposed a higher than necessary threshold of "inventiveness." Packers Plus argued that the Federal Court had required the invention to be "truly new, useful and unobvious,"[73] which is a higher standard than what is required by law to obtain a patent. Reading the Federal Court's reasons in totality, the Court of Appeal decided that it was clear that the Federal Court had applied the correct test.[74] However, this standard of inventiveness is not necessarily intuitive and should be kept in mind when considering what technology can be found inventive.

Fourth, Packers Plus argued that the Court had erred by failing to address a persuasive, though not mandatory, question in considering inventiveness: "if the invention was obvious, why didn't you do it?" If this question is not answered by the patentee, the Court can find that the invention only seems obvious because it's being considered using hindsight.[75] The Court of Appeal clarified that the question is not mandatory to answer and that either way, there was an answer in this case. There had been no long-felt need for the ball-drop method because shale formations had only recently begun to be exploited at the time of the alleged invention.[76] Again, this explanation might apply in any case involving fracking technology.

Finally, Packers Plus argued that the Federal Court's obvious-to-try analysis imposed a lower standard than necessary to find obviousness – that the invention "might work" rather than the legally correct test, that

63 *Packers Plus* FCA at paras. 29-31, 33, 39.
64 *Packers Plus* FCA at para. 32.
65 *Packers Plus* FCA at para. 32.
66 *Packers Plus* FCA at para. 36.
67 *Packers Plus* FCA at para. 22.
68 *Packers Plus* FCA at para. 37.
69 2019 FC 581 [*Aux Sable*].
70 *Aux Sable* at paras. 136, 144-151, 174.
71 *Aux Sable* at para. 176.
72 *Packers Plus* FCA at para. 13.
73 *Packers Plus* FCA at para. 23.
74 *Packers Plus* FCA at para. 38.
75 *Packers Plus* FCA at para. 25.
76 *Packers Plus* FCA at para. 40.

the invention "ought to work."[77] Having already found the invention obvious, the Court of Appeal held that the obvious-to-try holdings were not necessary to consider on appeal.[78] The Court of Appeal did not consider the anticipation and non-infringement arguments for the same reason, and specifically cautioned "these Reasons should not be viewed as endorsing the Federal Court's findings or Reasons in respect of these issues."[79]

This decision by the Court of Appeal carries on the trend we identified in last year's issue of *Mining in the Courts:* the Federal Court of Appeal's reluctance to interfere in fact-based decision-making by the Federal Court with respect to oil field technology patent litigation. Companies involved in patent litigation should bear this in mind when preparing for trial and not rely on a potential second kick at the can on appeal.

77 *Packers Plus* FCA at para. 27.
78 *Packers Plus* FCA at para. 42.
79 *Packers Plus* FCA at para. 3.

Surface Rights and Access to Minerals

Kathryn Gullason

Goldcorp Canada Inc. v. Bardessono et al., 2019 CanLII 22838 (Ontario Mining and Lands Tribunal)

In this decision, the Ontario Mining and Lands Tribunal granted surface rights to Goldcorp Canada Ltd. and Goldcorp Inc. (together, Goldcorp), despite all the interest-holders being deceased or assumed to be deceased.

Goldcorp sought to redevelop two of its non-operative mining properties near Timmins, Ontario, into a new operating mine. To do so, Goldcorp required surface rights to certain lands located in the Township of Deloro. The parcel registers of the subject lands indicated that its owners were either deceased, or assumed to be deceased given the passage of time. Goldcorp was able to locate representatives or possible representatives for some of the interest-holders, but not all. On November 13, 2018, Goldcorp filed an application with the Tribunal for a grant of the surface rights to the subject lands.

On November 22, 2018, the Tribunal issued an order specifying to whom and the manner in which notice of the Application should be given. According to the order, Goldcorp notified the representatives of the deceased interest-holders by electronic mail, and published a notice in both the Northern Miner and in a newspaper in the city or town where each of the unrepresented deceased interest-holders last lived.

No descendants or representatives notified the Tribunal of an intention to appear, except for the descendants of one, whose interest Goldcorp subsequently acquired. On this basis, the Tribunal determined, pursuant to s. 4.1 of the *Statutory Powers Procedures Act*, that a hearing was not required and granted the surface rights to Goldcorp. The Tribunal was satisfied that the subject lands were necessary for the proper working of the mine. Further, the Tribunal was satisfied that the parties had agreed on compensation, therefore, no compensation order was required.

Tax

Kathryn Gullason

Huckleberry Mines Ltd. v. British Columbia (Finance), 2019 BCCA 124

This was an attempted appeal from a decision discussed in *Mining in the Courts*, Vol. IX, regarding the calculation of tax payable under the British Columbia *Mineral Tax Act* (Act).

Huckleberry Mines Ltd. (Huckleberry) operates a copper mine located near Houston, B.C. Huckleberry's investors include three Japanese smelter companies and the Marubeni Corporation, a commodities trading company. The Act requires Huckleberry to pay taxes on gross revenue derived from its mine. According to the Act, gross revenue includes the "transaction value of the mineral product disposed of in the fiscal year of the mine," and transaction value is the "price paid or payable for the mineral product."

In 1997, Huckleberry entered into a sales agreement with its Japanese investors to sell copper at a set price calculated by using the average London Metal Exchange (LME) Copper Grade A Settlement Price for the third month following the month in which the copper shipment arrived in Japan (3MAMA Price). The 3MAMA Price exposed Huckleberry to price fluctuation in copper during shipment from B.C. to Japan. In order to achieve greater price certainty, the parties entered into a series of subsequent agreements. Under those agreements, Huckleberry would sell copper to Marubeni, which would then sell it to the Japanese smelters at the 3MAMA Price. Meanwhile, Marubeni would undertake certain hedging operations on the LME.

After an audit, the Commissioner issued notices of assessment to Huckleberry for the 2006 and 2007 fiscal years. Huckleberry appealed its 2006 tax assessment, arguing that its gross revenue should be assessed on the basis of the 3MAMA Price less the losses incurred by Marubeni's hedging operations, as opposed to the 3MAMA Price alone. The Minister of Finance rejected Huckleberry's appeal.

The British Columbia Supreme Court agreed with Huckleberry that the price used to calculate the tax payable should have been based on the lower price Huckleberry was entitled to and actually received. It found that, given the meaning of "transaction value of a mineral product" under s. 8 of the Act, Marubeni's hedging operations were relevant to determining the price. The province appealed the decision.

The British Columbia Court of Appeal dismissed the province's application for leave to appeal. The province argued that the appeal raised questions of law in respect of the interpretation of the Act, and was important to the ongoing administration of the Act. The Court disagreed, finding that the proposed appeal did not raise real questions of statutory interpretation. Rather, the province's disagreement was with the trial judge's interpretation of the parties' contractual arrangements. Further, the Court held that the appeal would be of limited importance to the province in administering the Act, since the case involved complex arrangements that did not reflect industry norms. Therefore, the Court concluded that the proposed appeal did not have sufficient merit for leave to be granted.

About McCarthy Tétrault

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

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- M&A
- Mining
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