Mining in the Courts

Year in Review

Vol. XII - March 2022

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Welcome to *Mining in the Courts*, 2022

Welcome to the 12th annual edition of *Mining in the Courts*, a publication of McCarthy Tétrault LLP's Mining Litigation Group that provides a one-stop annual update on legal developments impacting the mining industry.

The industry continued to fare well during the second year of the COVID-19 pandemic, illustrating the depth, creativity and strength within the sector. And as we saw last year, despite shifting lockdowns and other restrictions, Canadian courts remained open and active, deciding a number of cases in 2021 that involve, or impact, the mining industry. Indeed, the industry has been front and centre on a number of developments across many different areas of law, including class actions, contract law, labour and employment, and shareholder disputes. Many of these cases are summarized inside this publication, allowing you to see the impact the industry continues to have on the development of Canadian law.

In addition to providing summaries of important cases impacting the mining sector, this edition contains articles with our insights on current legal trends and what we think the industry can expect to face in the coming year. ESG remains an important focus, and *Race to the Top: The Rise of ESG and the Emergence of a Global Sustainability Disclosure Standard* (pg. 43) reviews the leading ESG standards and efforts to establish a common global standard. Other noteworthy articles include *Good Directions on Good Faith: Updates from the SCC* (pg. 35) which provides a useful update on the increasingly important contractual duty of good faith, and *Mandatory Vaccination Policies in the Workplace: Legislative Developments and Enforceability* (pg. 51) which examines the hot topic of workplace vaccination policies.

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

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A very special thank you to Heather Mallabone and to all of our other contributors who are noted throughout the publication, and to our student contributors, Kara Bodie, Alexandra Comber, Will Fraser, Josh Friedman, Dinah Holliday, Madison Howell, Lindsay Karpetz, Luke Morassut, and Todd Pribanic-White.

Case Law Summaries

Aboriginal Law

Bryn Gray and Selina Lee-Andersen

Impacts to Indigenous Economic Interests in IBA Triggers Duty to Consult

In *Ermineskin Cree Nation v. Canada (Environment & Climate Change)*,[1] the Federal Court held that a Crown decision with the potential to adversely impact a First Nation's economic benefits under an Impact Benefit Agreement (IBA) triggered the duty to consult. This case was one of two decisions in the past year that addressed the consideration of Indigenous economic interests in project consultation and decision-making. The decision is under appeal and, as discussed further below, there is another appeal before the Alberta Court of Appeal that is considering a similar issue.[2]

The *Ermineskin* case involved an application by the Ermineskin Cree Nation (Ermineskin) to quash an order designating the Vista Coal Mine expansion project in Alberta as a reviewable project under the federal *Impact Assessment Act* (IAA). The project was designated under the IAA at the request of two First Nations after the Minister had declined six months earlier to designate the project. Ermineskin was consulted on the initial designation decision but was not notified or consulted on the second designation request. The designation order was also contrary to the recommendation of the Impact Assessment Agency. Ermineskin argued that the Minister breached its duty to consult, as the designation order would delay or eliminate the economic interests negotiated in an IBA in October 2019 in connection with the proposed expansion of the mine.

The Federal Court agreed and found that the IBA was an economic interest that was closely related to and derivative of Aboriginal and treaty rights (in this case, harvesting rights) and capable of triggering the duty to consult. The Court reasoned that the IBA was designed to mitigate any adverse impact on Ermineskin's Aboriginal rights and provide them with economic benefits as compensation, and that a Designation Order could adversely impact those benefits by delaying or indirectly stopping the project.

1. *Ermineskin Cree Nation v. Canada*, 2021 FC 758.
2. *AltaLink Management Ltd. v. Alberta (Utilities Commission)*, 2021 ABCA 342.

Therefore, there was a duty to consult. The duty had been breached, as there had been no consultation whatsoever.

Although it may be surprising that the federal government did not consult Ermineskin from a policy and relationship perspective, the underlying reasoning of this decision is questionable. The duty to consult is focused on avoiding or minimizing impacts to Aboriginal and treaty rights. This can include impacts to economic components of rights, such as commercial harvesting rights, but its extension to adverse impacts to contractual benefits in third-party contracts is novel, particularly when these benefits are not derivative components of Aboriginal or treaty rights and there would be no impact to Aboriginal or treaty rights from the Crown decision at issue.

If this decision is upheld by the Federal Court of Appeal, it could expand the circumstances in which the duty to consult is triggered and the issues that need to be considered in project consultation. There are also similar challenges by two other Alberta First Nations before the Federal Court[3] and the Alberta Court of Appeal[4] relating to decisions by the federal government and the Alberta Energy Regulator to decline approvals of the Grassy Mountain coal project. The First Nations — one of whom requested the designation order of the Vista Mine expansion project — are alleging breaches of the duty to consult by the federal government and the joint review panel acting for the Alberta Energy Regulator for failing to consider their economic interests in declining the approval of the project.

In another case involving the consideration of Indigenous economic interests within the context of Crown decision-making, *AltaLink Management Ltd. v. Alberta (Utilities Commission)*,[5] the Alberta Court of Appeal held that when the Alberta Utilities Commission (AUC) considers whether a decision is in the public interest, it should take a broad approach that considers the benefits to Indigenous communities and to Indigenous economic activity. The decision related to whether two limited partnerships controlled by the Piikani Nation and Blood Tribe (the FN LPs), which had acquired electrical transmission assets on their reserves, could pass on their audit and hearing costs to ratepayers. The AUC approved the transfer of assets to the FN LPs, but as part of the "no-harm" test ordered that the FN LPs absorb their hearing and external auditor costs in order to avoid any impact to ratepayers. The AUC specifically refused to take into account the past benefits to ratepayers of siting the line on the shortest route.

The Court of Appeal held that the FN LPs should be allowed to include their auditing costs in their respective tariffs, and that the AUC had erred in considering only forward-looking benefits as part of the "no-harm test." The Court noted that there were lower maintenance costs for the shorter and more accessible route, and projects that increase the likelihood of economic activity on reserve — and the potential associated jobs and education — are in the public interest and should be encouraged.

In concurring reasons, Justice Feehan noted that the AUC is obliged to consider the honour of the Crown and act consistently with it whenever it engages with Indigenous collectives. He also found that, as an administrative tribunal with a broad public interest mandate, the AUC should have also addressed reconciliation between Indigenous peoples and the Crown, including a consideration of the interests of Indigenous peoples in participating freely in the economy and having sufficient resources to self-govern effectively.

3. *Benga Mining Limited et al. v. The Minister of ECC et al.*, File T-1270-2 (s.18.1 Application for Judicial Review).
4. *Benga Mining Limited v. Alberta Energy Regulator*, 2022 ABCA 30. In a decision released on January 28, 2022, the Alberta Court of Appeal rejected the request from Benga Mining and two area First Nations to appeal the Alberta Energy Regulator's decision to decline approvals for the Grassy Mountain coal project.
5. *Supra* note 2.

Ontario Court Issues Interlocutory Injunction to Stop Mineral Exploration Activities

In *Ginoogaming First Nation v. Her Majesty the Queen in Right of Ontario et al*,[6] the Ontario Superior Court granted an interlocutory injunction enjoining the Quaternary Mining & Exploration Company Limited and Hard Rock Extension Inc. from conducting mineral exploration activities within an area of the Ginoogaming First Nation's (Ginoogaming) traditional territory pending a trial raising issues relating to consultation and treaty infringement.

The injunction related to a mineral exploration permit issued in June 2019 for mining claims located about five kilometres south and southwest of Ginoogaming's reserve. The proponent had obtained a mineral exploration permit in the area in 2015 and applied for a renewal of the permit in 2018. The Ministry of Energy, Northern Development and Mines (ENDM) notified Ginoogaming of the application in a letter sent on July 20, 2018, and requested comments within 30 days. A followup email was sent 10 days later and ENDM assumed Ginoogaming had no concerns about the proposed activities after not hearing back. The consultation co-ordinator for Ginoogaming deposed that he had requested more time to identify cultural and spiritual sites in the area, but ENDM did not have a record of such communication.

There was a subsequent delay in issuing the permit due to concerns raised by another First Nation. The permit was ultimately issued in June 2019. Ginoogaming raised significant concerns to ENDM about the issuance of the permit in July 2019 and objected to work commencing, indicating that the project was on land of high cultural and spiritual significance. Ginoogaming brought an injunction after the proponent issued a mobilization notice in 2020, and an interim injunction was granted on consent in September 2020, pending the interlocutory injunction hearing.

Justice Vella of the Ontario Superior Court of Justice granted an interlocutory injunction after finding that there were serious issues to be tried regarding the adequacy of consultation and an infringement of Aboriginal and treaty rights, that the First Nation had established irreparable harm, and that the balance of convenience favoured granting the injunction. The Court found that the proposed mining exploration activity would likely cause irreparable harm because it could reasonably destroy important wildlife, plant life, and sites of spiritual and cultural significance, including by desecrating gravesites, which could not be compensated for by an award of monetary damages. The Court indicated it was sympathetic to the plight of prospecting companies caught in the middle between the Crown and First Nations, but found the balance of convenience favoured Ginoogaming, given the potential harm and the fact that the mining claims were speculative and "not going anywhere."

In assessing the adequacy of consultation, the Court was only required to consider whether there was a serious (not frivolous or vexatious) issue to be tried. This is a low threshold but the judge notably disregarded engagement by the proponent over several years because the Crown had never formally delegated any aspects of the duty to consult to the proponent. The failure to consider engagement by the proponent is inconsistent with past court decisions that have considered engagement by both the Crown and proponents in assessing the meaningfulness of consultation. It also ignores the practical reality that consultation on projects is largely proponent driven and initial engagement often occurs before the duty to consult is even triggered. This initial engagement should be encouraged, not disregarded because the Crown has not yet become involved or formally delegated consultation. The Court also dismissed arguments by the proponent about the First Nation not raising concerns earlier in the process, finding that the First Nation's obligation is to engage with the Crown. This is not consistent with other jurisprudence on the reciprocal obligations in consultation.

Notwithstanding these issues, the case highlights the risks of assuming there are no concerns when no response is received to written correspondence. When providing notice and information and no response is received, it is prudent to followup to ensure that the information was received and that the potentially affected Indigenous groups have an opportunity to raise and discuss any concerns.

6. *Ginoogaming First Nation v. Her Majesty The Queen In Right of Ontario et al*, 2021 ONSC 5866.

Saskatchewan Court Dismisses Injunction Relating to IBA Negotiations

In *Métis Nation - Saskatchewan v. Nexgen Energy Ltd.*,[7] the Court of Queen's Bench for Saskatchewan dismissed an injunction application by the Métis Nation – Saskatchewan (MNS) to prohibit NexGen Energy Ltd. (NexGen) from moving forward with an environmental assessment of a proposed greenfield uranium mine. MNS argued that NexGen should be prohibited from moving forward because they had breached an agreement to negotiate an IBA in good faith.

The proposed mine would be developed in the southwest Athabasca Basin of northern Saskatchewan, which is subject to an Aboriginal title claim filed by the MNS in 1994. NexGen completed a feasibility study in 2018 and received government and regulatory approval of the project description in 2019. Thereafter, NexGen sought the assistance of MNS, and the parties entered into a written agreement (the Study Agreement) to formalize a framework to advance the environmental assessment and exchange of information that would be used to inform the Crown in carrying out consultation. The Study Agreement stated that NexGen would undertake its best efforts to negotiate in good faith and formalize an IBA with MNS for the project on or before June 30, 2020. The parties negotiated but could not reach agreement on an IBA.

Applying the three-prong test of *RJR-MacDonald*,[8] Justice Clackson held that there was a serious issue to be tried over whether NexGen breached the Study Agreement by failing to negotiate in good faith and, if so, what damages flow to MNS as a consequence. However, the motion for an interlocutory injunction failed on the second prong of the RJR-MacDonald test, as the Court was of the view the underlying claim was a "garden variety contract dispute between private parties." The claim did not bring into question Aboriginal title to the land, the Crown's duty to consult, or MNS's right or obligation to participate in the environmental review process. The agreement was about economic benefits which the Court found was, by definition, capable of quantification in monetary terms and that it was illogical to suggest that monetary damages would be an inadequate remedy.

The Court also held that the balance of convenience did not favour granting the interlocutory injunction. The Court noted several facts in making this determination, including that MNS's case appeared weak on the facts and that the injunction requested did not flow from the contractual rights MNS sought to enforce as there was no contractual right to prevent NexGen from filing an Environmental Impact Statement. The Court also found that the injunction essentially granted veto power to MNS over the environmental review process, which was not bargained for, and that declining the injunction would not weaken MNS's negotiating position, as it never had the contractual right to interrupt the environmental assessment process pending completion of the IBA.

7. *Métis Nation - Saskatchewan v. Nexgen Energy Ltd.*, 2021 SKQB 195.
8. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 SCR 199.

Cases to Watch

There are several cases to watch this coming year, including two cases challenging the mineral tenure regimes in Québec and B.C.:

- *Mitchikanibikok Inik (Algonquins of Barriere Lake) v. Attorney General of Québec (Government of Québec and Minister of Energy and Natural Resources)*, which is scheduled to be heard in the fall of 2022, is challenging the "free entry mining" regime in the *Québec Mining Act*. The Mitchikanibikok assert that the regime breaches the duty to consult, as it allows mining claims to be registered without consulting Indigenous communities. The *Mitchikanibikok Inik* rely on a 2012 decision of the Yukon Court of Appeal in *Ross River Dena Council v. Government of Yukon*,[9] which found that the Yukon regime was deficient because it failed to provide a mechanism for an appropriate level of consultation with First Nations.
- *Gitxaala Nation v. British Columbia*, which was filed in the fall of 2021, seeks declarations that the provincial Crown breached the duty to consult in granting mineral claims over lands on which Gitxaala asserts Aboriginal title, and that B.C.'s system for granting mineral titles is not consistent with the *UN Declaration on the Rights of Indigenous Peoples* or the honour of the Crown. Gitxaala are relying on the B.C. *Declaration on the Rights of Indigenous Peoples Act* (the Declaration) and seeking a declaration that the provincial Crown has a statutory duty to consult and co-operate with Gitxaala concerning measures to ensure laws relating to mineral titles are consistent with the Declaration.

9. *Ross River Dena Council v. Government of Yukon*, 2012 YKCA 14.

Article

Cumulative Impacts on Treaty Rights Halt Development in Northeastern B.C.

Bryn Gray and Selina Lee-Andersen

In June 2021, the British Columbia Supreme Court issued a landmark ruling in *Yahey v. British Columbia (Yahey)*[1] in which it held that the province of B.C. (Province) had unjustifiably infringed the treaty rights of the Blueberry River First Nations (Blueberry) through the cumulative effects of a provincially authorized industrial development in northeastern B.C. This development included significant oil and gas and forestry activities over the last several decades.

The decision was by far the most significant Aboriginal law decision in 2021 for project development in Canada. It followed a 160-day trial in which Justice Burke concluded that the Province had taken up lands in Blueberry's traditional territory to such an extent that Blueberry members are no longer able to meaningfully exercise their treaty harvesting rights and that the Province may not continue to authorize activities that unjustifiably infringe Blueberry's treaty rights. This — together with the Province's decision not to appeal the ruling — has effectively paused permitting for projects throughout the Treaty 8 territory in B.C. while the Province attempts to negotiate a path forward with Blueberry and other Treaty 8 First Nations in B.C.

The implications of Yahey are not limited to northeastern B.C. The ruling is likely to lead to increased scrutiny of cumulative impact concerns in project consultation generally. It will likely lead to similar claims by other First Nations in Treaty 8 and other areas of the country with historic treaties. As discussed further below, the decision highlights the importance of governments and proponents taking cumulative impact concerns seriously and ensuring these issues are adequately assessed and addressed in the project consultation.

Background on the Claim

This case required the Court to consider the extent of the Province's authority to take up lands under Treaty 8. This historic treaty was negotiated in 1899 and related to an 840,000 square kilometre area that is larger than France. It includes portions of northeastern B.C., northern Alberta, northwest Saskatchewan, and southern Northwest Territories.

Treaty 8 — like many historic treaties — provides the First Nations signatories and adherents a right to hunt, trap, and fish throughout the tract surrendered except on lands that are taken up from time to time for settlement, mining, etc. Blueberry argued that the Province's ability to take up lands under Treaty 8 was limited by a fundamental promise made during treaty negotiations that First Nations would be able to continue their way of life based on hunting, trapping, and fishing. Blueberry argued that industrial development in their 38,000 square foot traditional territory was well beyond what was contemplated at the time of Treaty 8 — and that this development had significantly interfered with their way of life and infringed their treaty rights.

> ***"And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations….and save and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes."***
>
> **Treaty 8, June 21, 1899**

The Province argued that Treaty 8 was designed to open up the lands for settlement and development and foreshadowed change. Based on the land take-up clause and other jurisprudence, the Province asserted that Blueberry needed to prove that there was no meaningful right to hunt, fish, or trap in their territory to establish an infringement. Justice Burke rejected this approach. In her 512-page ruling, she concluded:

> "…the Province's conduct over a period of many years — by allowing industrial development in Blueberry's territory at an extensive scale without assessing the cumulative impacts of this development and ensuring that Blueberry would be able to continue meaningfully exercising its treaty rights in its territory — has breached the Treaty.
>
> …
>
> …for at least a decade, the Province has had notice of Blueberry's concerns about the cumulative effects of industrial development on the exercise of its treaty rights. Despite having notice of these legitimate concerns, the Province failed to respond in a manner that upholds the honour of the Crown and implements promises contained in Treaty 8. The Province has also breached its fiduciary duty to Blueberry by causing and permitting the cumulative impacts of industrial development without protecting Blueberry's treaty rights."[2]

The outcome of this case was largely driven by the Court's interpretation of Treaty 8 and the test the Court adopted to assess whether an infringement arose, along with evidence about the extent of development in Blueberry's territory.

Notably, Justice Burke found that Treaty 8 "protects Blueberry's way of life from forced interference, and

1. 2021 BCSC 1287 (Yahey).
2. *Yahey* at para. 3.

protects their rights to hunt, trap, and fish in their territory."[3] The written text of Treaty 8 does not include a promise to protect First Nations' way of life or any expressed limitation on the land take-up clause. This finding was based on evidence of oral assurances provided during negotiations including from the Treaty Commissioners. The finding impacted the Court's interpretation of how the Province could exercise the land take-up clause, finding that the Province cannot take up so much land that Blueberry "can no longer meaningfully exercise its right to hunt, trap, and fish in a manner consistent with its way of life."[4]

> ***"Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed…***
>
> ***We assured them that the treaty would not lead to any forced interference with their mode of life."***
>
> **1899 Report of the Commissions for Treaty 8**

This finding also modified the threshold for establishing an infringement. Justice Burke held that the appropriate standard to establish an infringement was whether Blueberry's treaty rights "have been significantly or meaningfully diminished when viewed within the way of life from which they arise and are grounded."[5] She held that Blueberry's treaty rights have been infringed by the Province based on a range of expert and lay evidence, including:

- **The Extent of Development:** the Court held that the landscape in Blueberry's traditional territory had been significantly impacted by industrial development and accepted the findings of studies in 2016 and 2018 that found 73-85% of Blueberry's traditional territory is within 250 metres of a disturbance, and between 84-91% is within 500 metres of a disturbance.[6]
- **Impacts on Wildlife of Importance to Blueberry Members:** the Court held that industrial development in Blueberry's traditional territory has caused or likely contributed to the decline of certain species of importance to Blueberry, specifically caribou, moose, marten and fisher.[7]
- **Impacts on Ability to Undertake Harvesting Activities:** the Court held based on evidence from seven Blueberry members that they are finding it harder to hunt, trap, fish, and gather, that they are not able to access their preferred hunting, trapping, and fishing places, and they are having to travel further from their homes to undertake harvesting activities.[8]

Justice Burke found that this infringement was not justified, rejecting the Province's position that it could not advance a justification defence before the scope of rights were known. The Court noted that it would have been difficult for the Province to justify the infringements in light of the evidence.

The Court also held that the Province failed to diligently implement treaty promises and breached its fiduciary duty to Blueberry by not taking adequate steps to manage and mitigate these effects.[9] Justice Burke reviewed the province's current regulatory frameworks for oil and gas, forestry, and wildlife management and found that these regimes failed to adequately consider cumulative impacts to treaty rights.[10] She also held that consultation on a permit-by-permit basis has not been an appropriate way to address Blueberry's concerns about cumulative impacts.[11]

The Province's Response

The Province announced on July 28, 2021, that it would not be appealing the decision. In making this announcement, the B.C. Attorney General stated that "the Province recognizes that negotiation, rather than litigation, is the primary forum for achieving reconciliation and the renewal of the Crown-Indigenous Relationship."[12]

> ***"We welcome the opportunity to work closely with Blueberry River First Nations, other Treaty 8 Nations, stakeholders and the public to build a path forward for resource development in the territory — one that provides stable economic activity and employment along with environmental sustainability and respecting Treaty 8 rights."***
>
> **Attorney General David Eby, July 28, 2021**

The Province has effectively paused all permitting in Treaty 8 territory in B.C. while these negotiations are underway with Blueberry and other Treaty 8 First Nations. On October 7, 2021, the Province announced that it had reached an initial agreement with Blueberry to provide C$65 million in funding to support various restoration

3. *Yahey*, paras. 3, 1809.
4. *Yahey*, paras. 3, 1809.
5. *Yahey*, para. 541
6. *Yahey*, para. 1076
7. *Yahey*, paras. 1124-1128.
8. *Yahey*, paras. 1099, 1106.
9. *Yahey*, paras. 1786, 1809.
10. *Yahey*, para. 1751.
11. *Yahey*, para. 1802.
12. *British Columbia, Attorney General's Statement on Yahey v. British Columbia*, July 28, 2021, online: news.gov.bc.ca/releases/2021AG0117-001488.ra. 1802.

activities and measures to support Blueberry in protecting their way of life.[13] As part of this agreement, it was announced that 195 forestry and oil and gas projects that had already been authorized before the *Yahey* decision would proceed, but that 20 currently approved authorizations in areas of high cultural importance would not proceed without further negotiation and agreement from Blueberry. The agreement did not address ancillary permits for the 195 projects or deal with any permit applications that were pending.

No further agreements have been announced and Blueberry and the Province issued a joint statement at the end of December 2021 indicating that work on a "shared, long-term solution that supports a sustainable and stable economy" was underway.[14] No timelines were provided, but the joint statement that the work "involves addressing over 100 years of impacted treaty rights" suggests a new framework will likely take considerable time. There has since been a change in leadership at Blueberry as Judy Desjarlais was elected to replace Chief Marvin Yahey Sr. in January 2022. Negotiations are continuing, but the change in leadership may initially impact the speed of negotiations.

Implications of Decision

The Province has a very challenging road ahead in trying to establish a balanced framework that can provide greater protection of treaty rights, while still allowing responsible development to proceed. This is also an area of overlapping claims with differing positions among Treaty 8 First Nations on development. The Province will need to address the concerns of Blueberry and the other Treaty 8 First Nations, or it will likely be faced with further litigation.

In addition to providing an agreed upon approach to assessing and monitoring cumulative impacts, a new deal could include modifications to the Province's approach to revenue sharing, reclamation activities for historic and more recent disturbances, and other measures to protect and restore important habitat and address other issues that were already impacting development and harvesting activities in this area. It is likely to build on existing conservation measures in the region, such as the Partnership Agreement for the Conservation of the Southern Mountain Caribou, reached in February 2020 between the Salteau and West Moberly First Nations and the B.C. and federal governments.

These are significant issues that will likely take time to resolve, particularly given the many parties involved and differing interests — including among First Nations — that need to be considered. In the meantime, permitting in northeastern B.C. is stalled and nothing is currently moving forward in Blueberry's claim area without the agreement of Blueberry.

The *Yahey* decision has several implications beyond permitting in northeastern B.C. First, the decision provides another way for Indigenous groups to challenge projects and development outside of the duty to consult. It will likely lead to more infringement claims in other areas of Treaty 8 and throughout the country. There are existing similar claims that have been commenced with respect to Treaty 4 and Treaty 6 in Saskatchewan and Alberta. The written text of the Historic Numbered Treaties, which cover land from northern Ontario to B.C., have similar provisions relating to harvesting rights and land take-up clauses. However, it is important to note that the result in *Yahey* was largely driven by what was said during treaty negotiations and the Court's interpretation of how that assurance limited the scope of other clauses in the treaty and impacted the threshold at which an infringement arose, as well as the extent of development. Each case will need to be considered on its own facts and the treaty negotiation context. Other courts may take different approaches in assessing the threshold for infringement based on the treaty context or reach different conclusions on the significant legal and evidentiary issues that cases like this raise — issues that an appellate court has not yet weighed in on. The justification test will also likely be at issue in future claims. New claims may be more limited and focused on smaller areas of importance or specific projects but the establishment of a cumulative impacts infringement claim remains complex.

Second, the decision will likely see increased scrutiny of cumulative impact concerns in project consultation. This issue has often not been rigorously assessed in consultation even though there are several prior cases confirming that cumulative impacts on Aboriginal and treaty rights are relevant to the duty to consult and can serve to deepen the level of consultation and accommodation required.[15] The *Yahey* decision is not the first time a Canadian court has raised significant concerns about unaddressed cumulative impacts on treaty rights. This was also the subject of a recent Alberta Court of Appeal decision in *Fort McKay First Nation v. Prosper Petroleum (Fort McKay)*,[16] which set aside the Alberta Energy Regulator's (AER) approval of a bitumen recovery project by Prosper Petroleum. The Court of Appeal did so after finding the AER failed to consider whether the honour of the Crown was engaged and required delaying approval due to ongoing negotiations between the Alberta government and Fort McKay (another Treaty 8 First Nation)

13. *British Columbia, B.C., Blueberry River First Nations reach agreement on existing permits, restoration funding*, October 7, 2021, online: news.gov.bc.ca/releases/2021IRR0063-001940.

14. *British Columbia, Joint statement on land management discussions*, December 29, 2021, online: news.gov.bc.ca/releases/2021IRR0068-002459.

15. *Chippewas of the Thames First Nation v. Enbridge Inc.*, 2017 SCC 41 at para. 42. For a detailed discussion of jurisprudence on the consideration of cumulative impacts in project consultation, see Audino, Axmann, Gray, Howard, Stanic, "Forging a Clearer Path Forward for Assessing Cumulative Impacts on Aboriginal and Treaty Rights," Vol. 57, No. 2, Alberta Law Review, albertalawreview.com/index.php/ALR/article/view/2577.

16. 2020 ABCA 163. *For a discussion of this case see "Risk of Unaddressed Cumulative Impacts" in* Mining in the Courts, Vol. XI.

to develop a land-use plan that would address cumulative impacts in the Moose Lake area. The plan had been promised to be completed by the Province in September 2015 and was only completed in February 2021 after the Court of Appeal's decision.

The decisions in *Yahey* and *Fort McKay* and the language used by the judges in these decisions demonstrate that the courts will not hesitate to intervene when they conclude that there are serious unaddressed issues relating to cumulative impacts on treaty rights. The rulings demonstrate the need for governments and proponents to ensure this issue is adequately assessed and addressed. In the context of project approvals, this requires understanding what Aboriginal or treaty rights are being exercised in the vicinity of a particular project, how cumulative impacts have affected the ability of the particular Indigenous groups to exercise their rights generally and what resources are needed to meaningfully exercise rights. It also requires understanding what additional incremental impacts the project will have on Aboriginal or treaty rights, the nature of those impacts in terms of magnitude, duration, reversibility, and probability of occurring, and how those additional incremental impacts can be avoided, mitigated, or offset. It is important to note that accommodation in the context of cumulative impacts for the duty to consult is focused on avoiding, mitigating or offsetting the incremental additional impacts of the Crown decision at issue and not addressing the past impacts of other projects.

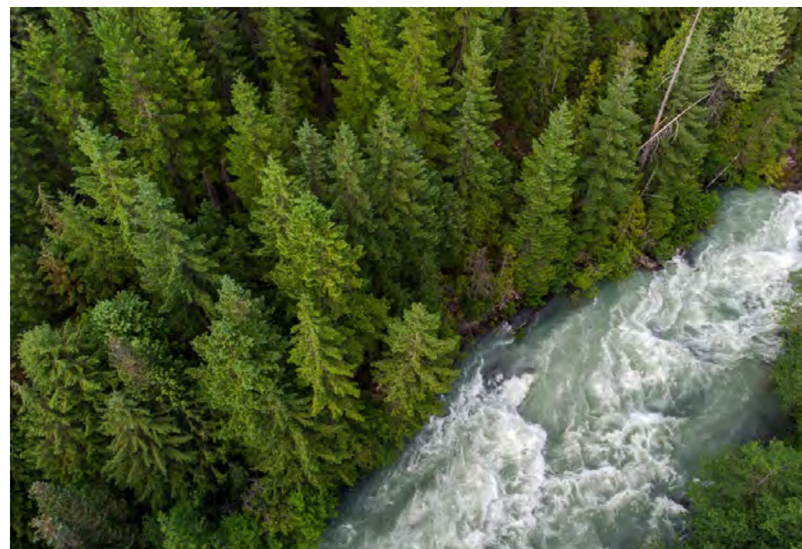
Proactive engagement is critical to identifying these issues early on and by working collaboratively, it ensures the project is developed in a way that avoids or minimizes further impacts. This, together with ensuring that potentially impacted Indigenous groups benefit from projects through available jobs, procurement, and other economic opportunities including — partnerships on projects — can also help to obtain the support of Indigenous groups where possible and develop and maintain positive relationships. This will continue to be key to mitigating risk, particularly where there are significant cumulative impact concerns.

The Province's current *Cumulative Effects Framework* (CEF) includes policy, procedures and tools that complement current land management policies, land-use plans and various best practices. The Province has also developed the *Cumulative Effects Framework Interim Policy for the Natural Resource Sector*,[17] which is the first step in providing a consistent and transparent set of policies and tools to help identify and manage cumulative effects specific to the natural resource sector. While implementation of the CEF is a multi-year and multi-phase effort, the *Yahey* decision may accelerate the development of certain CEF programs, such as regional engagement strategies, and the integration of the CEF into existing natural resource decision-making processes — all with the aim of ensuring that cumulative effects are identified, considered and managed consistently. The federal government and certain provinces beyond B.C. may also introduce legislative, regulatory or policy changes relating to the assessment of cumulative impacts as a result of the *Yahey* decision. These issues go beyond individual projects, but we expect the Crown will rely heavily on proponents to assess cumulative impacts on Aboriginal and treaty rights and to ensure measures are in place to avoid, offset, or minimize any additional incremental impacts from the project at issue where there are valid cumulative impact concerns.

Although there is a need to consider cumulative impacts in project reviews, it is not an issue that can be effectively addressed in individual project reviews. Project reviews are focused on the future. They can be used to avoid or minimize further impacts but are not equipped to address the past. This requires different collaborative processes and co-operation and compromise on all sides — which is all part of the reconciliation process. The federal, provincial and territorial governments have a significant role to play in working with Indigenous groups and industry to establish better land-use planning processes that identify where development can proceed and resources and areas that require protection or restoration.

The task is not easy, but a better path forward is needed to more proactively address cumulative impact concerns outside the scope of project reviews. It remains to be seen what changes will result from the negotiations with Blueberry and Treaty 8 First Nations and how those changes will be implemented but many are watching closely and the implications of the *Yahey* decision are likely to reverberate for many years to come.

17. British Columbia, *Cumulative Effects Framework – Interim Policy for the Natural Resource Sector*, October 2016, online: www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/cumulative-effects/cef-interimpolicy-oct_14_-2_2016_signed.pdf.



Case Law Summaries

Administrative Law

Caroline-Ariane Bernier, Connor Bildfell, Alexis Hudon, Heather Mallabone, and Charles-Étienne Presse

Highlands District Community Association v. British Columbia (Attorney General), 2021 BCCA 232

In this decision, the British Columbia Court of Appeal confirmed that it was not unreasonable for a mines inspector to approve a proposed small-scale rock quarry under British Columbia's *Mines Act* without considering its climate change impacts.

O.K. Industries Ltd. (OKI) applied to the Minister of Mines, Energy and Petroleum Resources for a *Mines Act* permit to operate a small-scale rock quarry in the District of Highlands. The mines inspector noted the climate change concerns raised by opposing petitioners and stated: "While this is an important issue and Canada has passed a non-binding motion to declare a national climate emergency in Canada, climate change is not relevant under the *Mines Act*." The inspector granted the requested permit, concluding that there were no health, safety, economic, or environmental grounds to deny a permit, and that the most relevant concerns had been adequately addressed.

The Highlands District Community Association (HDCA) applied for judicial review on the grounds that the inspector's failure to consider the proposed quarry's climate change impacts constituted an improper fettering of his discretion under the *Mines Act* and rendered his decision unreasonable. The British Columbia Supreme Court rejected these submissions.[1]

The Court of Appeal dismissed HDCA's appeal. The Court held that although the statute *permitted* the inspector to consider climate change impacts, it did not *require* him to do so. The Court also held that it was not unreasonable for the inspector to decline to consider climate change impacts in the circumstances. The Court stated that although climate change is "no doubt an important issue," it is neither a key element of the *Mines Act* nor a key element of the permitting process for a quarry of the size and scope in issue.

HDCA's application for leave to appeal to the Supreme Court of Canada was dismissed.[2]

For more on this decision, see McCarthy Tétrault LLP's *Canadian Appeals Monitor* blog post entitled "B.C. Court of Appeal Provides Guidance on the Relevance of Climate Change Impacts in Administrative Decision Making."

1. See 2020 BCSC 2135. For a discussion of a related decision in this case concerning an injunction application, see *Mining in the Courts*, Vol. XI.
2. 2021 CanLII 112319 (SCC).

O.K. Industries Ltd. v. District of Highlands, 2021 BCSC 81 and 2022 BCCA 12

In these decisions, the British Columbia courts confirmed that the provincial government has exclusive jurisdiction over mines and mining activities in British Columbia. These decisions also confirm that municipalities are prohibited from enforcing bylaws that infringe on the province's authority over mines and mining activities, even if those bylaws do not directly conflict with provincial laws.

As the operator of a quarry on lands within the District of Highlands (District), O.K. Industries Ltd. (OKI) possessed a permit issued under British Columbia's *Mines Act*. The permit allowed OKI to drill, blast, excavate, haul, crush, screen, stockpile, load-out and reclaim certain minerals and lands. Among other things, the permit restricted vegetation removal through provisions such as a minimum distance of undisturbed vegetated buffers, a requirement to minimize vegetation clearing, and a prescribed time in which logging and clearing could take place.

In October 2020, OKI began logging certain parts of the lands. The District served OKI with a cease-work order on the basis that it was logging without a valid and subsisting tree-cutting permit, contrary to the District's bylaws. OKI petitioned the court for a declaration that its quarry operations were not subject to the bylaws.

Relying on the British Columbia Court of Appeal's decision in *Cowichan Valley (Regional District) v. Cobble Hill Holdings Ltd.*,[3] the Supreme Court of British Columbia confirmed that the province possesses exclusive jurisdiction over all activities captured by the definitions of "mine" and "mining activity" in the *Mines Act*. The Court found that the question of whether the municipality had interpreted the scope of its authority in a manner incompatible with the province's exclusive jurisdiction was subject to a correctness standard of review, but held that the District's decision to enforce its bylaws in this context was not only incorrect, but also unreasonable. As such, the Court stayed the cease-work order and declared that the District's bylaws were of no application to OKI's quarry operations, so long as they purported to conflict with the province's jurisdiction over mines and mining activities.

The District appealed the decision on the basis that *Cobble Hill* is irreconcilable with other case law and the municipality's enabling legislation. In *O.K. Industries Ltd. v. District of Highlands*, 2022 BCCA 12, the Court of Appeal agreed that the District has the authority to regulate soil removal and deposit generally, and to regulate, prohibit, and impose requirements in relation to trees, but confirmed that this authority does not allow the District to prohibit any activity authorized under a mines permit. The Court of Appeal therefore allowed the appeal in part by narrowing the scope of the lower court's declarations to more accurately reflect the District's authority, but upheld the decision to stay the cease-work order.

3. 2016 BCCA 432. For a discussion of this case, see *Mining in the Courts*, Vol. VII.

Northern Cross (Yukon) Ltd. v. Yukon (Energy, Mines and Resources), 2021 YKSC 3 and 2021 YKCA 6

In these decisions, courts in Yukon struck a number of claims against the government of Yukon (Government) and the Minister of Energy, Mines and Resources (Minister) arising out of a moratorium on hydraulic fracturing but allowed claims in *de facto* expropriation and nuisance to stand.

In 2010, Chance Oil and Gas Limited, formerly known as Northern Cross (Yukon) Ltd. (Chance), became the 100% working interest owner and operator of 15 permits (Permits) covering approximately 1.3 million acres in the Eagle Plains Basin in Yukon (the Lands). Chance alleged that, prior to issuing the Permits, the Government and the Minister were aware that Chance expected the Lands to contain unconventional resources that could only be extracted by hydraulic fracturing. The Permits did not restrict hydraulic fracturing, nor the pursuit of unconventional resources.

In 2015, the Government imposed a moratorium on the use of hydraulic fracturing in the territory. Chance commenced an action against the Government and the Minister on the basis that the moratorium deprived it of the resources it was entitled to under the Permits. Chance pleaded unlawful cancellation of disposition under s. 28 of Yukon's *Oil and Gas Act*, nuisance, unlawful interference with economic relations, unjust enrichment, and *de facto* expropriation. It also sought an order in the nature of *mandamus* to compel the Minister to exempt the Permits from the moratorium. The Government and the Minister brought an application to strike a number of Chance's claims.

The Supreme Court of Yukon struck the claims of unlawful interference with economic relations, the order in the nature of *mandamus*, and all claims against the Minister. The Court found that it was plain and obvious that the claim in unlawful interference with economic relations would fail because Chance had not pleaded facts to support the contention that the defendants had intended to cause it to suffer an economic harm. Furthermore, it was plain and obvious that the order in the nature of *mandamus* would fail because Chance's pleading lacked the necessary specificity to justify such an order. Finally, it was plain and obvious that the claims against the Minister would fail because, aside from the order for *mandamus*, Chance had not sought any relief against the Minister personally.

The defendants appealed the decision on the basis that, among other things, the Supreme Court of Yukon had erred in failing to strike all the claims against it. The Court of Appeal allowed the appeal in part. It struck the claim for unlawful cancellation of disposition, finding that Chance had not advanced the elements of any known or novel cause of action, and that the claim essentially mirrored an application for judicial review. The Court of Appeal also struck one of two claims in unjust enrichment on the basis that the Government had not received any benefit from Chance's alleged deprivation. The Court did not strike Chance's claims in *de facto* expropriation or nuisance, finding neither was bound to fail.

Cassiar Jade Contracting Inc. v. Messmer, 2021 BCSC 1963

In this decision, the Supreme Court of British Columbia upheld the Chief Gold Commissioner's determination that a large jade boulder was a "placer mineral" under British Columbia's *Mineral Tenure Act*, thereby granting rights in it to the corporation with a placer claim over the area where the boulder was found.

Under the *Mineral Tenure Act*, mineral claims and placer claims are distinct titles and may be registered separately over the same area. Cassiar Jade Contracting (Cassiar) held a mineral claim, and Canada Tsinghua International Jade Investment Group Corp. (Tsinghua) held a placer claim, over the area in question.

When Tsinghua discovered the boulder in 2019, Cassier's mine manager sought a determination from the Commissioner as to whether Tsinghua was permitted to work in the area and whether the boulder was placer or mineral. The Commissioner identified the issue before him as whether the boulder was a "mineral" or a "placer mineral," as defined in the *Mineral Tenure Act*. Under the *Mineral Tenure Act*, a mineral can be found in talus rock, while a placer mineral cannot. The Commissioner conducted a field inspection and reviewed reports prepared by a number of experts. He ultimately preferred the evidence of one expert over another and concluded that the boulder was embedded in a material other than talus rock. Accordingly, the boulder fell within the *Mineral Tenure Act*'s definition of placer mineral and the rights in it belonged to Tsinghua.

Cassier appealed the Commissioner's decision to the Supreme Court of British Columbia. The Court found that the Commissioner did not err in failing to consider whether the boulder was itself "talus rock," in interpreting or applying the definitions of "mineral" or "talus rock," or in reviewing or considering the evidence before him. Notably, the Court concluded that the Commissioner had answered the proper question before him — i.e., whether the boulder was a mineral or a placer mineral — and had properly applied the definitions in the *Mineral Tenure Act*. Accordingly, the Court dismissed Cassier's appeal.

Syncrude v. Director, Public Lands Disposition Management Section, Land Policy and Programs Branch, Lands Division, Alberta Environment and Parks, 2021 ABPLAB 18

In this decision, the Public Lands Appeal Board (Board) rejected a motion to dismiss a Notice of Appeal for being filed outside of the time frame legislated under Alberta's *Public Lands Administration Regulation* (Regulation).

Syncrude Canada Ltd. operates the Mildred Lake mine and upgrader and the Aurora Mine oilsands mining operations pursuant to Mineral Surface Leases (Mineral Leases) and Surface Material Leases (Material Leases). Under agreements related to the Mineral Surface Leases, Syncrude was entitled to royalty exemptions for the sand and gravel within the area leased under the Surface Leases.

On June 24, 2019, the Director, Public Lands Disposition Management Section, Land Policy and Programs Branch, Land Division, Alberta Environment and Parks (Director) sent Syncrude a letter regarding its entitlement to the royalty exemption. On December 22, 2020, the Director issued invoices to Syncrude that did not reflect the royalty exemption. The parties continued to communicate, and on May 26, 2021, the Director issued a letter confirming that Syncrude was not entitled to a royalty exemption for its surface materials, and that the amounts payable in the invoices were accurate.

Syncrude appealed the Director's decision to the Public Lands Appeal Board. The Director filed a motion to dismiss the Notice of Appeal on the basis that it was filed outside the time frame set out in s. 217(1) of the Regulation: either 20 days after the appellant became aware of the decision objected to, or 45 days after the date the decision was made, whichever elapses first. The Director took the position that, to the extent a decision was made in this case to vary Syncrude's royalty entitlement, it was made when the Director sent the June 2019 letter. This would mean that the limitation period had expired.

The Board held that neither the June 2019 letter, nor the December 2020 invoices, constituted a "decision" sufficient to start the limitations clock. The May 26, 2021 letter was the first written instance that clearly and unambiguously presented the Director's decision and reasons for not allowing the exemption and was therefore the first decision rendered. The Board dismissed the Director's motion to dismiss, holding that Syncrude's notice of appeal was filed within the legislated timeframe.

The Director also brought a separate motion to dismiss the Notice of Appeal on the basis the appeal was outside the Board's jurisdiction. The Board subsequently confirmed that the May 26, 2021 letter was an appealable decision over which it had jurisdiction and denied the Director's motion (2022 ABPLAB 1).

Minéraux Mart Inc. v. Québec (Développement durable, Environnement, Faune et Parcs), 2021 QCTAQ 09229

In this decision, an ore conditioning and processing company challenged an administrative monetary penalty imposed by the Ministry of Environment and Fight Against Climate Change (Ministry) for the emission of dust particles in violation of the general prohibition contained in s. 20 of Québec's *Environment Quality Act* (Act).

Minéraux Mart Inc. (Minéraux Mart) is an ore conditioning and processing company that holds certificates of authorization from the Ministry for the operation of a mineral mixing plant in Québec. In 2017, the Ministry imposed on Minéraux Mart an administrative monetary penalty of C$10,000 for the emission of "dust particles" contrary to s. 20 of the Act. Minéraux Mart applied to the Administrative Tribunal of Québec (Tribunal) for a review of this decision.

Minéraux Mart argued that s. 20 of the Act does not apply to a contaminant subject to a regulated emission standard, in this case the *Regulation respecting the purification of the atmosphere*. The Tribunal disagreed and found that the penalty was imposed for the emission of manganese dust particles, which are not subject to a regulatory standard, though the notice and penalty only specified dust particles generally. The Tribunal noted that the Act distinguishes administrative and criminal penalties, and because this penalty was administrative in nature, it did not need to specify the contaminant with which it was concerned.

Minéraux Mart also argued that its contribution to the contamination was minimal, because the contaminants were either emitted when the ore was loaded onto and transported by third-party trucks or when the dust was raised in the air by the traffic near its facility. The Tribunal found that Minéraux Mart was responsible for the manganese emissions. It held that even if Minéraux Mart did not employ the truck drivers, it could control the way that the ore was transported; for instance, by requiring that the ore in the bucket of the trucks be covered by a canvas. Further, even if Minéraux Mart could not control the traffic on the nearby road, it was responsible for the presence of the manganese.

Lastly, Minéraux Mart claimed that it had acted diligently to minimize the emission of contaminants by implementing an action plan, which included regulating the transport of the ore and asphalting its yard. The Tribunal acknowledged such actions but held that they were insufficient and that a reasonable person would have performed a general characterization of its emissions and implemented the required measures as soon as it became aware of the issue. The Tribunal confirmed that Minéraux Mart violated s. 20 of the Act and upheld the penalty.

Case Law Summaries

Bankruptcy and Insolvency

Frédérique Drainville, Gabriel Faure, Forrest Finn, Jocelyn Perrault, François Alexandre Toupin, Alain N. Tardif, and Matthieu Rheault

Yukon (Government of) v. Yukon Zinc, 2021 YKCA 2

In this decision, the Court of Appeal of Yukon (YKCA) decided four appeals arising from the receivership proceedings of Yukon Zinc Corporation (Yukon Zinc), and clarified several issues, including the nature of claims for unpaid environmental remediation security, the ability of receivers to disclaim agreements while imposing new terms on third parties, and whether a receiver's charge can extend to the assets of third parties. As discussed separately in the article "Super-Charged: *Yukon (Government of) v. Yukon Zinc Corporation* and the Application of the Super-Priority Charge Under s. 14.06(7) of the *Bankruptcy and Insolvency Act* to Mineral Claims," the YKCA also clarified the scope of the environmental "super-priority" charge created by s. 14.06(7) of the *Bankruptcy and Insolvency Act* (Act).

Yukon Zinc owned and operated the Wolverine Mine in the Yukon (Mine), the underground portion of which flooded in 2017. The Yukon government (Yukon) increased the amount of the security required under Yukon Zinc's mining licence (Remediation Security) from C$10 million to over C$35 million. Yukon Zinc failed to pay this increase. From May to August of 2018, Welichem Research General Partnership (Welichem), Yukon Zinc's senior secured creditor, advanced multiple loans that were secured against all of Yukon Zinc's assets — including its mineral claims. On September 3, 2018, Yukon Zinc sold certain equipment at the Mine (Master Lease Items) to Welichem and Welichem leased the equipment back to Yukon Zinc pursuant to a master lease agreement (Master Lease). The receiver, PricewaterhouseCoopers Inc. (PwC) issued a disclaimer notice disclaiming the Master Lease but purporting to reserve the right to use a subset of the Master Lease Items (Essential Lease Items) on unilaterally imposed terms.

The YKCA dealt with appeals from various orders of the Supreme Court of Yukon (YKSC). First, the YKCA denied Yukon's appeal from the YKSC's order that Yukon does not have a claim provable in bankruptcy for the unpaid amounts of the Remediation Security, agreeing with the YKSC's conclusion that, for a claim to be provable in bankruptcy, it has to be recoverable or enforceable by legal process.[1] Since s. 139 of the *Quartz Mining Act* did not grant Yukon the ability to recover unpaid amounts of the Remediation Security, Yukon did not have a claim provable for those amounts.

1. See *Mining in the Courts*, Vol. XI for a discussion of this decision (2020 YKSC 15).

In addition, the YKCA allowed Welichem's appeal in part and granted its application to the extent of declaring that the Receiver's purported appropriation of the Essential Lease Items in the disclaimer notice was of no force and effect. Considering s. 72(1) of the Act, which upholds general provincial laws regarding third-party property rights, and prior Supreme Court of Canada decisions, the YKCA found that, absent explicit language to the contrary, the Act ought not be interpreted to interfere with third-party property rights. While s. 243 of the Act permitted the Receiver to take possession and control of Yukon Zinc's property, that power did not extend to the property of third parties like Welichem.

Finally, the YKCA held that the YKSC erred in ordering that the Receiver's charge applied to Welichem's ownership interest in the Essential Lease Items. The YKCA found that the charging language in s. 243(6) of the Act was also limited to Yukon Zinc's property, and as such did not grant a court the ability to charge the property of third parties like Welichem.

Applications for leave to appeal to the Supreme Court of Canada were dismissed.[2]

2. 2021 CanLII 109581 (SCC); 2021 CanLII 109588 (SCC).

North American Lithium Inc. (Re), 2021 QCCS 2921

In this decision, the Superior Court of Québec issued a reverse vesting order to effect the purchase of North American Lithium Inc. (North American Lithium) by 9444-1169 Québec Inc. (Sayona), and ruled that the latter's offer was valid even though it contained two "transaction options."

North American Lithium, North America's only near-term lithium producer, filed for protection from creditors under the *Companies' Creditors Arrangement Act* in May 2019. After a 19-month sales process, North American Lithium and its court-appointed monitor, Raymond Chabot Inc., accepted Sayona's offer to acquire North American Lithium through a reverse vesting transaction valued at C$196 million and paid in part by the assumption of the secured debts of Investissement Québec amounting to C$99 million in principal.

The application for the approval of the transaction and issuance of a reverse vesting order was contested by an unsuccessful bidder on the grounds that Sayona's bid was invalid, and that the sale process was unfair. The unsuccessful bidder argued, among other things, that Sayona's offer was alternative in that it included two "transaction options," which would be contrary to the terms and conditions of the sale process approved by the Court.

The Court noted that fairness of the monitor in the context of a sale process does not extend to unlimited patience towards a bidder whose offer is missing critical conditions, including the required funds. Consultation of the secured creditors by the monitor regarding the choice of the successful bid is unavoidable when the offers are insufficient to repay their claims. The Court further observed that such an unsuccessful bidder is not an interested party under the *Companies' Creditors Arrangement Act*. The challenge was therefore dismissed, and the transaction was approved by the Superior Court of Québec. In doing so, the Court confirmed its authority to issue reverse vesting orders, a useful restructuring tool to achieve the sale of an insolvent business, while maintaining in force existing permits, licences, authorizations or essential contracts, and retaining the various tax attributes.

The Québec Court of Appeal dismissed the unsuccessful bidder's application for leave to appeal the approval of the transaction.[3] The transaction closed on August 27, 2021, making it Canada's third contested reverse vesting transaction to be approved.

For more on reverse vesting orders, see the article from *Mining in the Courts*, Vol. XI entitled "Preserving Permits, Licences and Tax Attributes in Distressed M&A Transactions by Reverse Vesting Orders."

3. 2021 QCCA 1186.

Article

Super-Charged: *Yukon (Government of) v. Yukon Zinc Corporation* and the Application of the Super-Priority Charge Under s. 14.06(7) of the *Bankruptcy and Insolvency Act* to Mineral Claims

Forrest Finn and H. Lance Williams

Introduction

On March 5, 2021, the Court of Appeal of Yukon (YKCA) released its unanimous decision in *Yukon (Government of) v. Yukon Zinc Corporation (Yukon Zinc)*,[1] granting a number of appeals sought by the senior secured creditor of Yukon Zinc Corporation (YZC). In its reasons, the YKCA clarified a number of important issues, including the scope of the super-priority charge for certain costs related to the remediation of environmental damage (14.06(7) Charge) created by s. 14.06(7) of the *Bankruptcy and Insolvency Act (BIA)*.[2] This article considers the impact of this decision on the scope of the 14.06(7) Charge and its application to mineral claims both inside and outside of Yukon.

The 14.06(7) Charge

Subsection 14.06(7) of the *BIA* provides that where a federal or provincial government remediates or remedies environmental conditions or damage on a debtor's real property (generally land), the costs it incurs are secured by a charge over the affected real property and any contiguous real property owned by that debtor. That charge then has priority over any other claim, right or charge on that real property.[3] The 14.06(7) Charge applies in a variety of restructuring and insolvency situations, including bankruptcies, receiverships, and proposals to creditors under the *BIA* and, through an analogous section, to restructuring proceedings under the *Companies' Creditors Arrangement Act (CCAA)*.[4]

The purpose of the 14.06(7) Charge was addressed by the Alberta Court of Appeal (ABCA) in *Orphan Well Association v. Grant Thornton Limited*.[5] In that decision, the ABCA found the charge was "based on the restitutionary principle that a party that discharges the obligation of another is entitled to be compensated for its efforts by the original obligee and its successors in title."[6] In other words, if a government remediates real property, discharging the defaulting owner's environmental obligations to do so, that defaulting owner (or its secured creditors) cannot benefit from the real property's increased value without first repaying the government for those remediation costs. Importantly, however, this principle also circumscribes the scope of the 14.06(7) Charge, resulting in a "limited and focused" remedy.[7]

Limited Scope of the 14.06(7) Charge

First, the 14.06(7) Charge is limited in what it can secure; it only secures claims provable under the *BIA*. On this basis, the YKCA upheld the long-established principle that a claim provable must be recoverable by legal process. Put another way, outside a bankruptcy a government must have been able to sue the debtor for the same claim. The issue in *Yukon Zinc* was whether unpaid amounts of reclamation security that YZC was required to pay to the government of Yukon pursuant to its mining licence under the *Quartz Mining Act (QMA)*[8] could be secured by the 14.06(7) Charge. The YKCA found that it could not and held that while the minister was entitled to require reclamation security under the *QMA* as a term of the licence, it could not recover unpaid security by legal action.[9] Its remedies were limited to those under the *QMA*. Consequently, the unpaid amounts of the reclamation security could not be secured by the 14.06(7) Charge.

In addition, while contingent claims may be claims provable under the *BIA*, these are not secured by the 14.06(7) Charge. Rather, the YKCA found that a plain reading of the underlying provision showed that the charge was created for "costs that have been incurred" and not for contingent or other anticipated future costs.[10]

Second, the YKCA found that the 14.06(7) Charge "is limited to the contaminated real property and related contiguous real property" of the debtor.[11] This finding is consistent with prior decisions from the SCC. For example, in *Newfoundland and Labrador v. AbitibiBowater Inc.*, Justice Deschamps considered the analogous section in the CCAA and held for the majority that the charge could only attach to certain assets. Indeed, "[i]f Parliament had intended that the debtor always satisfy all remediation costs, it would have granted the Crown a priority with respect to the totality of the debtor's assets."[12] It only attaches to real property.

While the term "real property" generally refers to land, its meaning is not fixed. Depending on the context of its use, the term may be limited to the land itself or may extend to both the land and third-party rights in or over it (often referred to as "interests" in land).[13] Accordingly, to better understand which of YZC's assets the 14.06(7) Charge could attach to, the YKCA had to determine the meaning of "real property" in subsection 14.06(7) of the *BIA*. In interpreting the meaning of the term, the YKCA considered, among other things, the various uses of "real property" and "interests in real property" throughout the *BIA*.

1. 2021 YKCA 2 [*Yukon Zinc*].
2. RSC 1985, c B-3 [*BIA*].
3. *Ibid*, s 14.06(7).
4. RSC 1985, c C-36, s. 11.8(8)(b).
5. 2017 ABCA 124, rev'd on other grounds 2019 SCC 5 [*Orphan Well SCC*].
6. *Ibid* at para 55.
7. *Ibid*.
8. SY 2003, c.14 [*QMA*].
9. *Yukon Zinc*, supra note 1 at para. 67.
10. *Ibid* at para. 81.
11. *Ibid* at para. 77; *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67 at paras 32, 33 [*Abitibi*].
12. *Abitibi, ibid* at para. 33.
13. EH Burn and J Cartwright, *Cheshire and Burn's Modern Law of Real Property*, 18th ed (Oxford: Oxford University Press, 2011) at 141; Bruce Ziff, *Principles of Property Law*, 7th ed (Toronto: Thomson Reuters Canada Limited, 2018) at 87; *Third Eye Capital Corporation v. Resources Dianor Inc.*, 2018 ONCA 253 at para. 31.

The YKCA first considered the term "property." This term is defined in the BIA to include, among other things "land and every description of property, whether real or personal […] as well as […] every description of estate, interest and profit."[14] The YKCA held that Parliament's use of the words "as well as" instead of, for example, "including" indicated that the term "real property" was not intended to include an *interest* in real property. The YKCA found that this conclusion was further corroborated by other sections of the *BIA*, including ss. 74(3) and 14.06(4) and (6), which used the terms "real property" and "interest" in real property separately. Applying the presumption against tautology, which provides that Parliament does not include unnecessary or meaningless language in its statutes and does not make the same point twice,[15] the YKCA held that "Parliament was aware of the distinction between 'real property' and 'an interest in real property' and did not intend that the security created by s. 14.06(7) would extend to an interest in real property."[16]

Therefore, to determine what assets are subject to the 14.06(7) Charge, it is necessary to determine the proprietary nature of the debtor's assets (i.e. whether they are real property or merely *interests* in real property).

The Nature of Mineral Claims in Yukon and the Application of the 14.06(7) Charge

The *BIA* is procedural legislation that relies heavily on provincial laws.[17] This applies to the proprietary nature of mineral claims, which are largely governed by provincial legislation.[18] Consequently, in determining whether the 14.06(7) Charge applies to the mineral claims at issue in *Yukon Zinc*, the YKCA considered s. 52 of the *QMA*, which provides that a mineral claim is "deemed to be a chattel interest, equivalent to a lease of the minerals […] for one year, and thence from year to year."[19] The YKCA held that the effect of this section was that, in Yukon, mineral claims are mere *interests* in real property and the 14.06(7) Charge did not attach to them.[20]

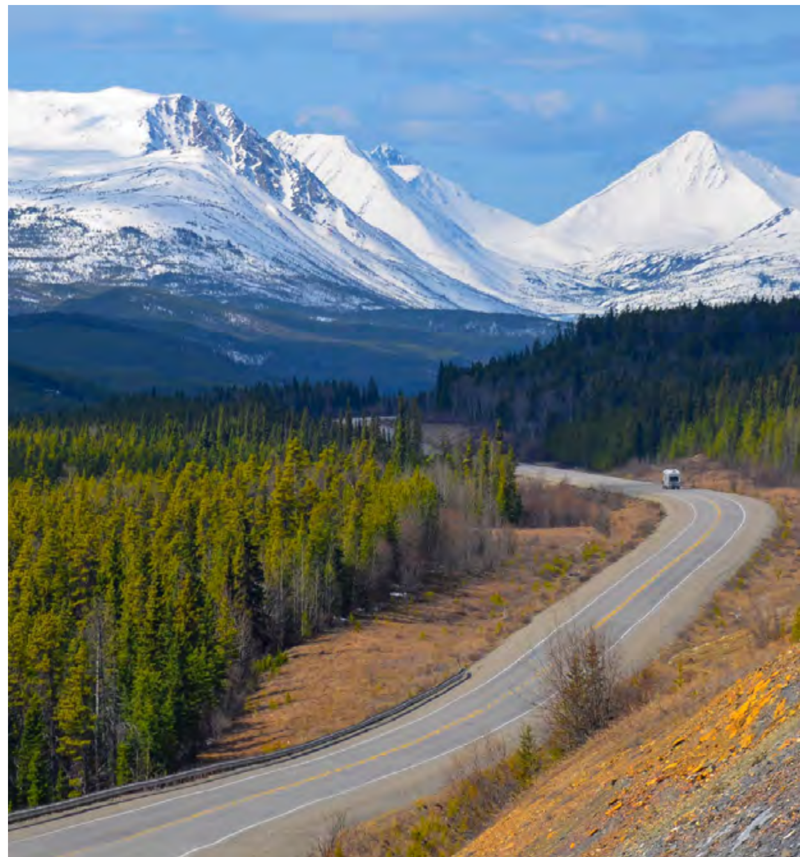
Importantly, however, since the proprietary nature of mineral claims can vary significantly depending on the underlying provincial legislation, the YKCA's decision in *Yukon Zinc* is not determinative of whether the 14.06(7) Charge will apply to mineral claims outside of Yukon. As Professor Barry Barton wrote in *Canadian Law of Mining*:

> The situation that we find is that the law is clear in Québec that a mining claim is an immovable real right, and it has been settled in Ontario since 1913 that rights under a claim can be considered as land, without that position likely to have been abandoned. In British Columbia it is settled that the interest is a personal property interest, even if the basis for the decision was debatable. Yukon, the Northwest Territories and Nunavut hold to an interest in land, while Nova Scotia sees no proprietary interest. In New Brunswick and Newfoundland and Labrador, with no provisions in the statute and no relevant case law, the question is open. […][21]

Conclusion

While *Yukon Zinc* clarified many issues in respect of the nature, scope, and application of the 14.06(7) Charge, it also highlighted the important role played by provincial legislation. Indeed, the specific nature of the obligations created, and the proprietary nature of mineral claims are essential to determining whether, and to what extent, the 14.06(7) Charge may apply. As a result, professionals working on such matters must develop a thorough understanding of that legislation and must engage experts in the area where necessary.

14. *BIA*, supra note 2, s. 2 "property" [emphasis added].
15. Ruth Sullivan, *Statutory Interpretation* 3rd ed (Toronto: Irwin Law Inc, 2016) at 43; *Canada (Attorney General) v. JTI-Macdonald Corp*., 2007 SCC 30 at para. 87.
16. *Yukon Zinc, supra* note 1 at para. 94.
17. *Orphan Well SCC,* supra note 5 at para. 64; see also *BIA, supra* note 2, s .72(1) and *Husky Oil Operations Ltd v. Minister of National Revenue*, [1995] 3 SCR 453, 1995 CanLII 69.
18. Dwight Newman, *Mining Law of Canada* (Toronto: LexisNexis Canada Inc, 2018) at 61.
19. *QMA*, *supra* note 8, s. 52.
20. *Yukon Zinc, supra* note 1 at paras. 96, 97.
21. Barry Barton, *Canadian Law of Mining,* 2nd ed (Toronto: LexisNexis Canada Inc, 2019) at 520, 521.



Case Law Summaries

Civil Procedure

Heather Mallabone

Kaban Resources Inc. v. Goldcorp Inc., 2021 BCCA 6

In this decision, the British Columbia Court of Appeal ordered a shell company with no exigible assets to post security for both trial and appeal costs after appealing a summary trial judgment.

The decision arises out an appeal of *Kaban Resources Inc. v. Goldcorp Inc*, 2020 BCSC 1307, discussed in *Mining in the Courts*, Vol. XI. In that case, Kaban Resources Inc. (Kaban) alleged that Goldcorp Inc. (now Newmont Corp.) (Goldcorp) had wrongfully repudiated an agreement. Prior to trial, Kaban was ordered to pay security for costs in the amount of C$60,000. Ultimately, the matter proceeded to a summary trial and Kaban's claim was dismissed. Kaban appealed the summary trial decision and Goldcorp applied for an order requiring Kaban to post additional security for its trial costs, as well as security for costs of the appeal. At the time the application was heard, Goldcorp's trial costs had not yet been assessed.

With respect to Goldcorp's appeal costs, the Court found that Kaban had not established that it had the means to satisfy a judgment of costs against it, nor had it led evidence to indicate that a requirement to post security for costs would prevent it from proceeding on a meritorious appeal. As such, Kaban had not established that the order would be contrary to the interests of justice and was ordered to post C$11,200 to secure Goldcorp's costs of the appeal.

With respect to Goldcorp's trial costs, the Court concluded that Kaban's appeal had the potential to negatively alter Goldcorp's ability to recover sums owing to it. Noting that Kaban's strategy had shifted since Goldcorp had first secured its costs, and that Goldcorp's trial costs now could not be assessed until the conclusion of the appeal without waiving privilege, the Court found that there was prejudice justifying additional security. Kaban was therefore ordered to post an additional C$60,000 in security for Goldcorp's unassessed trial costs.

Baffinland Iron Mines Corporation v. Inuavak et al, 2021 NUCJ 11

In this decision, the Nunavut Court of Justice granted an interlocutory injunction against protesters at the Mary River Project on Baffin Island.

Baffinland Iron Mines Corporation (Baffinland) operates an iron ore mine on northern Baffin Island known as the Mary River Project. The project site has an airstrip and a 100 km road linking the mine site to the port from which the ore is shipped. While ore can only be shipped out during open water season, it is trucked from the mine year-round and stockpiled at the port to await shipping. Baffinland receives payment for the ore when it arrives at the port, in order to maintain a revenue stream throughout the year.

Prior to this decision, Baffinland had applied to expand its mining operations. At the time of the decision, the application was undergoing review. On February 4, 2021, several residents from local communities most affected by the mining operations set up protests on the project site. Small protest camps were set up on the airstrip and the access road, consisting of five and two protesters, respectively. The protests kept a plane from landing on the airstrip and ore from being trucked from the mine site to the port.

Several days later, the Court issued an interim order to ensure that the protesters would not return to the project site. Baffinland then commenced an action for trespass, unlawful interference with economic interests, and mischief. Baffinland also applied for an interlocutory injunction. The defendants asserted their Aboriginal rights pursuant to s. 35 of the *Constitution Act* and submitted that injunctive relief was unnecessary as they had already left the project site.

The Court found that Baffinland's allegations of trespass, nuisance, and interference with economic interests leading to a significant economic loss constituted a serious issue to be tried. Next, the Court found that irreparable harm would result if the relief were not granted, because in the event of another shut down, Baffinland would receive no revenue and would still be liable for the costs of maintaining the project site. Although the defendants had temporarily left the project site, counsel was unable to establish that they had agreed not to return. Furthermore, the defendants' assertion of Aboriginal Rights was precluded by the Nunavut Land Claims Agreement, which sets out processes for resource developments and approvals for mining operations. Finally, the Court found that the balance of convenience favoured Baffinland. The blockade would result in significant economic losses for Baffinland, whereas the Defendants could protest elsewhere, where they could be seen and heard but mining operations would be unaffected. Accordingly, the Court granted the interlocutory injunction.

Bacanora Minerals Ltd. v. Orr-Ewing (Estate), 2021 ABQB 670

In this decision, the Alberta Court of Queen's Bench held that a party's claim for declaratory relief was statute-barred by Alberta's *Limitations Act* on the basis that it was more properly characterized as a request for remedial relief.

Mr. Orr-Ewing was the principal shareholder and director of Tubutama Borax PLC, which held all of the issued and outstanding shares of Tubutama Ltd. Tubutama Ltd. was the 100% owner of Mineramex Limited (Mineramex), the majority shareholder of Minera Sonora (Sonora). Shortly after completing its initial public offering in 2009, Bacanora Minerals Ltd. (Bacanora) acquired Mineramex.

In 2010, Sonora and Bacanora entered into a letter of intent to acquire certain lithium claim titles in northern Mexico. Sonora, Bacanora, and Mr. Orr-Ewing then entered into a Royalty Agreement (the Royalty Agreement), pursuant to which Sonora granted Mr. Orr-Ewing a gross overriding royalty amounting to 3% of the revenues derived from production of the lithium claim (the Lithium Royalty). In 2016, Mr. Orr-Ewing passed away.

Bacanora brought a claim against Mr. Orr-Ewing's estate (the Estate) on the basis that Mr. Orr-Ewing had made misrepresentations about his entitlement to the Lithium Royalty, and that his entitlement to any such royalty had ended when Bacanora acquired Mineramex. In its amended statement of claim, Bacanora sought a declaration that the Royalty Agreement was null and void or unenforceable, or alternatively an order that it be rescinded, as well as costs and any further and other relief as deemed appropriate by the Court. The Estate sought dismissal of the claim on the basis that Bacanora filed its claim outside of the two-year limitation period in s. 3 of the *Limitations Act*.

Only remedial, not declaratory, orders are subject to s. 3 of the *Limitations Act*. Therefore, the primary question was whether Bacanora's claim was remedial or declaratory in nature. A remedial order seeks to enforce a duty or a right, whereas a declaratory order defines and clarifies those duties or rights. In this case, the Court noted that while much of the factual matrix seemed to turn on how far the mining claim had progressed, categorizing the nature of the relief on that basis would "… pave the way for mischief by claimants facing limitations issues." The Court held that Bacanora was seeking a declaration of fact for the purpose of obtaining and enforcing an interest in the mining revenues, making the relief remedial in pith and substance.

After finding that the two-year limitation period was applicable, the Court held that Bacanora had both objective and subjective knowledge of the Lithium Royalty more than two years prior to filing its claim. The claim was therefore statute-barred.

Bacanora filed a Notice of Appeal of this decision on September 21, 2021.

Case Law Summaries

Class Actions

Lindsay Burgess and Heather Mallabone

0116064 B.C. Ltd. v. Alio Gold Inc., 2021 BCSC 540

In this decision, the Supreme Court of British Columbia refused to certify a proposed securities misrepresentation class action against a mining company, in part because of the predominance of individual issues in common law claims of misrepresentation.

The plaintiff, 0116064 B.C. Ltd., is a privately held company that owned shares of Rye Patch Gold Corp. (Rye Patch). In 2018, the defendant, Alio Gold Inc. (Alio) bought all of Rye Patch's shares under a plan of arrangement, for a price partially determined by the value of Alio and Rye Patch shares.

The plaintiff alleged that Alio had fraudulently or negligently made misrepresentations in a number of documents published prior to the plan of arrangement, thereby overvaluing its share price. The plaintiff also pleaded insider trading.

The Court declined to certify the action on the basis that the pleadings disclosed no cause of action, as is required under s. 4(1)(a) of British Columbia's *Class Proceedings Act*. First, the Court applied the rule in *Foss v. Harbottle* and found that only Rye Patch itself could sue for the alleged misrepresentation; individual shareholders have no claim for wrongs done to the corporation unless they bring a derivative action. Second, the Court found that the plaintiff's insider trading claim was improperly pleaded and statute-barred under the British Columbia *Limitation Act*.

The Court also found that a class action was not the preferable procedure. As each of the alleged misrepresentations were unique, and were made in different documents on different dates, the defendant would have needed to conduct individual inquiries of all class members in order to determine which statements they relied upon. The prevalence of individual issues would undermine judicial economy and made certification unsuitable. The Court noted that, although claims in misrepresentation are capable of being sufficiently common for resolution by way of class action, they frequently are not.

For more on this decision, see McCarthy Tétrault LLP's *Canadian Class Actions Monitor* blog post entitled "B.C. Supreme Court refuses certification of proposed securities class action because individual issues predominate."

Wong v. Pretium Resources, 2021 ONSC 54

In this decision, the Ontario Superior Court of Justice considered, for the first time, the merits of a class action under the secondary market liability provisions of the Ontario *Securities Act*. The Court dismissed the claim, finding that there had been no misrepresentation, and even if there had been, the defendants were entitled to a reasonable investigation defence.

Pretium Resources Inc. (Pretium) is a mineral exploration company developing the Brucejack gold mine in northwestern British Columbia. Pretium engaged Strathcona Mineral Services Ltd. (Strathcona) to oversee a bulk sample program at Brucejack. Pretium had also engaged Snowden Mining Industry Consultants Pty Ltd. (Snowden) to prepare a resource estimate and update it at the conclusion of the bulk sample program.

In 2013, Strathcona voiced concerns about Snowden's mineral resource estimate. Snowden considered Strathcona's concerns and advised Pretium that the existing resource estimate remained valid. Pretium's technical team also concluded that Strathcona was wrong. Strathcona eventually resigned, which Pretium disclosed in a news release. It also disclosed Strathcona's concerns about the resource estimate. Shortly after Strathcona resigned, Pretium began to receive mill results from the bulk sample that proved Strathcona was mistaken.

The plaintiff alleged that Pretium and its then-CEO failed to disclose material facts, pleading both common law misrepresentation and statutory misrepresentation under Part XXIII.1 of the *Securities Act*. In 2017, the Court granted leave to assert the cause of action for secondary market misrepresentation: *Wong v. Pretium Resources Inc.*, 2017 ONSC 3361. The Divisional Court refused leave to appeal, and the action was certified by consent. Both parties then brought cross-motions for summary judgment.

The Court found that Strathcona was not qualified to estimate Pretium's resources, and that "Strathcona's so-called concerns or opinions were not only unsolicited but inexpert, premature and unreliable." There had accordingly been no misrepresentation; the opinion was unreliable and was therefore immaterial. As such, the Court was satisfied that Pretium had acted properly and was correct in not disclosing it.

In any event, Pretium had reasonably investigated Strathcona's concerns and was entitled to a full defence on that basis. Pretium had conducted a reasonable investigation and had no reasonable grounds to believe that failing to disclose Strathcona's opinion constituted a misrepresentation.

The plaintiff appealed the decision, and the Ontario Court of Appeal heard the appeal at the end of 2021.

For more on this decision, see McCarthy Tétrault LLP's *Mining Prospects* blog post entitled "Finally – the First Merits Decision in a Securities Class Action for Secondary Market Misrepresentation."

Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund v. Barrick Gold Corporation, 2021 ONCA 104 and *Baldwin v. Imperial Metals Corporation*, 2021 ONCA 838

In these two decisions, the Ontario Court of Appeal grappled with the role of a "public correction" in the statutory remedy for a secondary market misrepresentation action against an issuer under s. 138.3(1) of the Ontario *Securities Act*. This provision provides a right of action for damages for misrepresentations made in documents released by the issuer to those who acquire or dispose of the issuer's security in the time frame between when the impugned document was released and when the misrepresentation in the document was publicly corrected. Leave of the court is required to proceed with a s. 138.3 action and will only be granted if the court is satisfied that the action is brought in good faith and there is a reasonable possibility that the action would be resolved in the plaintiff's favour.

In both of these cases, the motion judge had found that a "public correction" was a constituent element of the statutory cause of action and had denied leave to bring claims in respect of certain misrepresentations on the basis there was no real possibility that a trial court would find there had been a public correction of the alleged misrepresentation. The Court of Appeal declined to decide the issue of whether a "public correction" is part of the statutory cause of action, but it allowed the appeals in respect of those misrepresentations denied leave solely on the public correction point and remitted the matters back to the Superior Court. In doing so, the Court noted that, while public correction is an important part of the statutory scheme, its role at the leave stage is modest.

Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund v. Barrick Gold Corporation (Barrick Gold)

In this case, the motions judge denied leave to proceed with claims for the majority of the alleged misrepresentations on the basis they were not publicly corrected. The alleged misrepresentations arose in respect of the construction of Barrick Gold Corporation's (Barrick) multi-billion-dollar gold mining project in the Chilean and Argentinian Andes, known as Pascua-Lama. As it was located at the headwaters of the Estrecho river system, the project was complex and environmentally sensitive. Ultimately in October 2013, Barrick concluded that the project was not financially viable and shut it down, recording a writeoff of around C$5 billion. Over the course of the proposed two-year class period, there were five negative disclosures and Barrick's share price suffered significant declines.

The alleged misrepresentations in this case fell into three categories: (i) misrepresentations by omission relating to when Barrick expected initial gold production to commence at Pascua-Lama and to the estimated capital expense budget for Pascua-Lama; (ii) misrepresentations related to environmental compliance at Pascua-Lama; and (iii) misrepresentations by omission relating to accounting and financial information. With the exception of one alleged misrepresentation relating to environmental compliance, the motion judge denied leave to pursue a secondary market misrepresentation claim on the basis there was no reasonable possibility that these claims would succeed. Four of the alleged environmental compliance misrepresentations were denied because the material facts that the appellants alleged should have been disclosed either arose after the representations were made, or, were arguably, not required to make the representation at issue not misleading, and, alternatively, had not been publicly corrected. The motion judge denied leave for the remaining misrepresentations, however, solely on the basis they had not been publicly corrected in that the purported corrections were not linked or connected to the purported misrepresentations and omissions.

The appellants made two arguments on appeal related to public corrections. First, that the motion judge erred in principle by determining the public correction issue without first examining all of the evidence and determining whether there was a reasonable possibility that Barrick made a misrepresentation. Second, that the motion judge erred in principle by applying a narrow, purely textual, analysis of the alleged public corrections and failing to consider evidence, including expert economic evidence, about the context in which the alleged public corrections were

made and how the alleged public corrections would be understood in the secondary market.

With respect to the appellants' first argument, the Court held that it was open to the motion judge to assume that the alleged misrepresentations were made out and to deny leave to proceed on the basis that there was no reasonable possibility that a trial court would find there had been a public correction of those misrepresentations. The practice of assuming one element of a cause of action or legal test and disposing of a case on the basis that a different constituent element has not been established is acceptable, but it should be used sparingly in this context where both parties have an interest in a finding on that question; if misrepresentations are found to exist, the shareholder can have their claim made out, and if misrepresentations are not found to exist, the issuer can restore market confidence in its disclosure. But assuming a wrong (i.e. a misrepresentation), and then finding a second wrong (i.e. the failure to correct the misrepresentation), would do very little to restore market confidence.

With respect to the appellants' second argument, the Court held that the motions judge erred in principle in determining the public correction issue on a purely textual basis limited only to a "fair reading" of the impugned correction. Moreover, the impugned public correction need not specifically identify the alleged misrepresentation. In particular:

> … where the alleged public correction does not, on its face, clearly reveal the existence of the alleged misrepresentation, the judge must engage in a reasoned consideration of evidence of the context in which the alleged public corrections were made and how the alleged public corrections would be understood in the secondary market …[1]

The Court further found that this approach is supported by the role of public corrections within the statutory scheme. The Court noted that the public correction determines who can bring a claim for secondary market misrepresentation and standardizes the damage calculation by providing a "time-post for the class period and any eventual damages calculation."[2] It is not, however, a safeguard to protect against unmeritorious claims[3] and, while it is part of the statutory scheme, its role at the leave stage is limited.

In the result, the Court upheld the motion judge's decision denying leave for the four alleged environmental compliance misrepresentations on the basis that there was no reasonable possibility that the misrepresentation could be made out. However, the Court allowed the appeal with respect to the remaining misrepresentations and remitted them back to the lower court for further consideration.

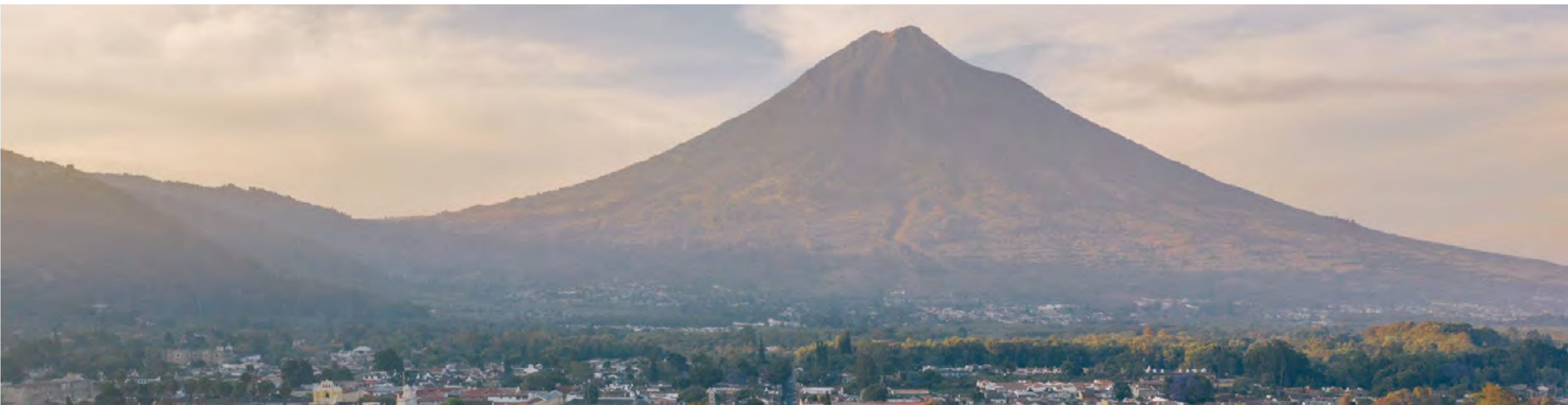
Leave to appeal this decision to the Supreme Court of Canada was refused.[4]

Baldwin v. Imperial Metals Corporation (Baldwin)

As we reported in *Mining in the Courts*, Vol. XI, the Ontario Superior Court of Justice in *Baldwin* dismissed the plaintiff's motion for leave to commence a secondary market misrepresentation claim against Imperial Metals Corporation (Imperial) under s. 138.3(1) on the basis that Imperial's alleged misrepresentations had never been publicly corrected. This matter involved the August 4, 2014 collapse of the perimeter wall and breach of the tailings storage facility (TSF) at the Mount Polley Mine in British Columbia. Imperial, the owner of the Mine, issued a press release that day stating that the cause of the breach was unknown to them at the time. The representative plaintiff alleged that Imperial made misrepresentations in that it was aware of potential risks and deficiencies in the tailings storage facility that should have been disclosed in public statements about the design, construction and operation of the mine. The motion judge found that the press release could not be a public correction because it did not indicate that the breach of the TSF had been caused by deficient design, defective construction, or problems in operation. The press release could only be considered a correction if the misrepresentation had been to the effect of "[t]he TSF is built to be failproof, and will never, ever fail."[5]

Following its decision in *Barrick Gold*, the Ontario Court of Appeal in *Baldwin* held that the motion judge had erred by requiring an "unduly onerous standard" for the establishment of a public correction by requiring it to be "express and directly linked to a specific misrepresentation."[6] In this regard, there only needs to be some linkage or connection between the alleged misrepresentation and the public correction; it need not be a mirror image. Moreover, how the alleged public correction would be understood by the market is an important consideration in the assessment of the alleged correction that is consistent with the statutory goal of encouraging fair and accurate disclosure by issuers. The Court held that, in light of the voluminous record in this case and the fact that the misrepresentation and omission allegations were hotly contested, the motion judge would be unable to determine if the alleged correction was reasonably capable of being understood in the market as a correction to something that was misleading without conducting a careful examination of the evidence surrounding the alleged misrepresentation or omission.

1. *Barrick Gold* at para. 51. See also para. 76.
2. *Barrick Gold* at para. 66.
3. *Barrick Gold* at para. 70.
4. 2021 CanLII 66411 (SCC).
5. *Baldwin* at paras. 28, 48.
6. *Baldwin* at paras. 48, 58.



Dyck v. Tahoe Resources Inc. et al, 2021 ONSC 5712

In this decision, the Ontario Superior Court of Justice granted leave to bring a secondary market misrepresentation action under Part XXIII.1 of the Ontario *Securities Act* and certified the proceeding as a class action, with a global class.

The defendant Tahoe Resources Inc. (Tahoe) was a publicly traded company listed on the TSX and the NYSE. The defendant, Ron Clayton, was Tahoe's President and CEO at the time of the alleged misrepresentation. Tahoe's flagship asset was the Escobal mine in Guatemala, operated through Tahoe's wholly owned subsidiary Minera San Rafael, S.A. pursuant to an exploitation licence granted by the Guatemalan government. In May 2017, a Guatemalan non-profit organization, CALAS,[7] brought "amparo" litigation (constitutional protection for citizens against government abuse) in Guatemala seeking suspension of the Escobal licence on the grounds that there was a failure to consult with local Xinka indigenous people prior to granting the licence. CALAS sought a provisional amparo (similar to an interlocutory injunction) while the litigation proceeded, and a definitive amparo.

The defendants issued a news release on May 24, 2017 (May Release), disclosing the claim brought by CALAS and making certain representations including that there was a "lack of indigenous communities in or around the mine," that consultation had occurred with indigenous peoples prior to the granting of the licence, and that Tahoe was "confident that the current claim [was] without merit." On July 5, 2017, the Supreme Court of Guatemala granted the provisional amparo request and suspended the Escobal licence until the definitive amparo could be determined, effectively shutting down operations at the Escobal mine. The defendants issued another news release following that decision (July Release) disclosing the provisional suspension of its licence. The plaintiff, Mr. Dyck, alleges that the May Release contained misrepresentations by omission in that it failed to disclose certain material facts about the nature of the relief sought by CALAS.

The defendants opposed both leave and certification but lost on both counts.

The Court first rejected all of the defendants' objections to the leave application, finding that the plaintiff had established a reasonable possibility of success that the omissions would be found to be material at trial. The defendants had also objected to the leave application on the basis the July Release, which disclosed that the provisional amparo had been *granted* and the licence suspended, was not a public correction because it did not correct their alleged failure to disclose *risks* of such events happening. Following *Barrick Gold*, the Court held that where there is a reasonable possibility of establishing a misrepresentation, the lack of public correction does not prevent a plaintiff from asserting the cause of action under Part XXIII.1.[8] Furthermore, the purported public correction need not be a mirror image of the purported misrepresentation. Rather, "it is enough if the alleged correction casts doubt on the reasonableness or accuracy of the earlier disclosure."[9] Here, the Court found that there was a reasonable possibility that a trial court would find that the reader of the July Release would understand that certain of Tahoe's statements in the May Release had been corrected.

The Court also certified the proceeding as a class action, finding that Mr. Dyck was an appropriate plaintiff. It also certified a global class. The Court rejected the defendants' assertion that U.S. shareholders should not be certified as members of the proposed class in light of a parallel class proceeding in the U.S. Instead, the Court found that it would be premature to dismiss the claims of certain class members in light of the U.S. proceeding as that litigation may not secure access to justice for the foreign shareholders and could fail for reasons unrelated to the Part XXIII.1 cause of action.

7. In Spanish, the organization is Centro de Acción Legal, Ambiental y Social de Guatemala, which translates as the Center for Legal-Environmental and Social Action of Guatemala.
8. *Dyck v. Tahoe Resources Inc. et al,* 2021 ONSC 5712 at para. 161, citing *Barrick Gold* at para. 71.
9. *Dyck* at para. 165, citing *Barrick Gold* at para. 165.

Kirk v. Executive Flight Centre Fuel Services, 2021 BCSC 987

In this decision, the Supreme Court of British Columbia re-certified certain common issues in an environmental class proceeding that had been remitted back to it by the Court of Appeal for further consideration.

As we reported in *Mining in the Courts*, Vol. X, the underlying dispute in this case 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 and brought claims in negligence, nuisance and the rule in *Rylands v. Fletcher*.

The chambers judge originally certified all 13 of the representative plaintiff's common issues. While the 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, it struck several common issues on the basis they would require individual assessment, which would be incompatible with a common issues trial. The following issues and questions were remitted back to the chambers judge for further consideration: whether a common issue in nuisance could be certified based on the mere fact of the issuance of the evacuation or water advisory orders (Issue E); the applicability of *Rylands v. Fletcher* (Issue H); whether aggregate damages as they relate to nuisance should be certified; and the question of whether the proceeding was a preferable procedure.

On the recertification application, the chambers judge noted that in order to certify a common issue in nuisance, the elements of the tort had to be captured in the wording of the issue. In particular, it was necessary to determine whether the evacuation and "do not use water" orders resulted in a common experience among the class members that rose to the level of "non-trivial interference." The chambers judge amended the wording of Issue E accordingly and certified the amended issue. The chambers judge also certified the issue of aggregate damages as they relate to the nuisance claim, finding that if the plaintiff succeeds in establishing liability for nuisance, the amount and appropriateness of aggregate damages would be in issue. With respect to Issue H, the chambers judge amended the issue in accordance with instructions from the Court of Appeal by removing the requirement of the *Rylands v. Fletcher* test that the escape caused damage on the basis an assessment of damages would require individual analysis and certified this amended issue as well.

The chambers judge also held that a class proceeding was a preferable procedure. He noted that determining which of the defendants are causally and legally liable for the spill, and to what degree, are determinations that will be necessary in any litigation related to the spill and its effects. The chambers judge rejected the defendants' submission that joinder would be a preferable means of putting forward these claims, finding instead that the size of the class and the potential for claims repeating the same issues of causation and responsibility rendered a class proceeding a more efficient use of judicial resources.

Case Law Summaries

Constitutional Law

Heather Mallabone

References re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11

In this decision, the Supreme Court of Canada confirmed that the federal *Greenhouse Gas Pollution Pricing Act* (GGPPA) is constitutional under the peace, order, and good government clause in s. 91 of the *Constitution Act, 1867*.

In 2018, the federal government implemented the GGPPA, establishing an integrated fuel charge and pricing mechanism for greenhouse gas emissions in Canada. The Attorneys General of Alberta, Ontario, and Saskatchewan each challenged the constitutionality of the GGPPA in their respective courts of appeal. As we reported in *Mining in the Courts*, Vol. X, the Ontario Court of Appeal and Saskatchewan Court of Appeal both found that the GGPPA was constitutional. However, as we reported in *Mining in the Courts*, Vol. XI, the Alberta Court of Appeal ruled that it was unconstitutional.

The majority of the Supreme Court of Canada concluded that the GGPPA is constitutional. In its "pith and substance" analysis, the Court found that the purpose of the GGPPA was to mitigate the effects of climate change by reducing greenhouse gas emissions. It then found that its effect is to price greenhouse gas emissions nationally so as to ensure that the provinces could not refrain from legislating pricing mechanisms, or from legislating less-stringent mechanisms than required to meet national targets. Therefore, its "pith and substance" is to establish minimum greenhouse gas prices in order to reduce greenhouse gas emissions in Canada.

The majority then found that the GGPPA was a matter of national concern, as climate change is an existential threat to humanity and carbon pricing is necessary to reduce greenhouse gas emissions. Moreover, the GGPPA has the requisite "singleness, distinctiveness, and indivisibility" to distinguish it from matters of provincial concern. Because greenhouse gas emissions are not bound by provincial borders, one province's failure to implement a gas pricing scheme would undermine the GGPPA's success. Finally, the legislation's impact can be reconciled with federalism, as the provinces remain free to create their own greenhouse gas pricing systems that meet federal standards. The Court noted that, although the GGPPA infringes on provincial autonomy, it is important for Parliament to address greenhouse gas emissions at the national level.

The three dissenting judges criticized the majority's approach as supporting an unjustified extension of the federal peace, order and good government power, concluding that the GGPPA was unconstitutional in its current form.

For more on this decision, see McCarthy Tétrault LLP's *Canadian Appeals Monitor* blog post entitled "Peace, Order, and Greenhouse Gasses: Canada's Top Court Affirms Federal GHG Pricing."

Case Law Summaries

Contracts

Caroline-Ariane Bernier, Connor Bildfell, Alexis Hudon, Heather Mallabone, Charles-Étienne Presse, and Janie L.-Roy

Boliden Mineral AB v. FQM Kevitsa Sweden Holdings AV, 2021 ONSC 6844

In this decision, the Ontario Superior Court of Justice found that the respondent breached several indemnities in a share purchase agreement and was liable to indemnify the applicant mining company for losses arising out of a tax reassessment conducted after the transaction had closed.

In 2016, First Quantum Minerals Ltd. (First Quantum), a B.C. company, sold its shares in Boliden Kevitsa Mining Oy (Kevitsa), a Finnish company, to Boliden Mineral AB (Boliden), a Swedish company. The share purchase agreement, which was governed by Ontario law and subject to the jurisdiction of the Ontario courts, contained two indemnities: (i) a general indemnity for losses incurred as a result of First Quantum's breach of representation or warranty; and (ii) a free-standing, tax-specific indemnity.

Before the transaction closed, Kevitsa had accumulated substantial tax losses. Under Finnish law, a company's tax losses are *prima facie* forfeited after a change of control. However, a company can utilize former tax losses under new ownership if granted a permit by the Finnish Tax Administration (FTA). After closing, Kevitsa applied for and received such a permit.

In April 2017, the FTA conducted a tax audit of Kevitsa in respect of a 2010 reorganization and restructuring. The FTA found that there were insufficient business reasons for the reorganization and disallowed substantial deductions for interest expense and exchange rate losses, and also levied a punitive tax penalty. At the time of the decision, Boliden had been forced to pay substantial amounts in reassessed taxes, penalties, and interest. First Quantum had assumed the defence of the matter and had pursued a number of appeals, but it had not indemnified Boliden for the losses incurred to date. Although First Quantum conceded that it may become liable to indemnify Boliden for amounts related to pre-closing tax periods — once the appeals were exhausted — it maintained that it had no obligation to indemnify for any post-closing tax period. As such, Boliden sought

declaratory and other relief in the Ontario courts, arguing, among other things, that First Quantum had breached its indemnity obligations.

The Court found that First Quantum had breached a representation and warranty in the SPA that provided that "there are no grounds for the reassessment" of Kevitsa's taxes. The Court noted that unlike other representations and warranties in the SPA, this one was not knowledge qualified, and it turned out to be incorrect, such that a breach was made out and the general indemnity was triggered. The Court also held that the scope of that indemnity was not restricted to pre-closing tax periods: it had no temporal limitation whatsoever. First Quantum argued that the post-closing period losses should be excluded on the basis that they were consequential or indirect. Although the Court agreed that the losses were the indirect consequence of the tax reassessment, it found that they remained subject to the indemnity because they were reasonably foreseeable within the express provisions of the SPA. The Court also found that both pre- and post-closing period taxes were captured by the tax-specific indemnity. Justice Penney noted that the provision was drafted broadly, and that the post-closing taxes were causally linked to the reassessment of the pre-closing tax years.

Ultimately, the Court ordered First Quantum to pay Boliden approximately €8.5 million, to be held in an interest-bearing trust account pending final disposition of all appeals from the reassessment. The parties were also directed to calculate the final amounts owing under the share purchase agreement once all appeals had been exhausted.

Kaban Resources Inc. v. Goldcorp Inc., 2021 BCCA 427

In this decision, the British Columbia Court of Appeal confirmed that a mining company had no legal duty to consent to a proposed financing arrangement that differed materially from the terms of a letter agreement.

Goldcorp Inc. (now Newmont Corp.) and two of its subsidiaries (Goldcorp) brought a summary trial application for an order dismissing a claim by Kaban Resources Inc. (Kaban) alleging breach of contract. The claim arose in the context of a proposed sale of Goldcorp's rights to the Cerro Blanco gold-silver mine in Guatemala and certain other assets. In February 2016, Goldcorp and Kaban signed a letter agreement providing that Goldcorp would transfer these rights to Kaban in exchange for a 40% interest in Kaban, a cash payment 12 months after commercial production, piggyback rights on an initial public offering of Kaban, and other consideration. This agreement was subject to Kaban raising C$35 million in financing.

In March 2016, Kaban and a mine operator, Fortuna Silver Mines Inc. (Fortuna), signed an agreement providing that Fortuna would supply the full financing, Kaban would issue 50.1% of its shares to Fortuna, and Fortuna would appoint a majority of Kaban's directors and all of its management team. The agreement was subject to Goldcorp's consent to Fortuna's participation, and to Goldcorp entering into a shareholders' agreement imposing new obligations on Goldcorp and granting Fortuna an unrestricted right to determine all aspects of Cerro Blanco's development. Goldcorp refused to consent on the basis that the Fortuna agreement was inconsistent with the Kaban letter agreement, which Goldcorp asserted had two implied terms: (i) that Kaban's founders would remain actively involved in Cerro Blanco; and (ii) that the financing would be invested into Cerro Blanco. Kaban sued for damages, alleging repudiation of the letter agreement.

As we reported in *Mining in the Courts*, Vol. XI, the British Columbia Supreme Court found that the letter agreement included the implied terms, the Fortuna agreement was inconsistent with the letter agreement, and Goldcorp had no legal duty to consent to the Fortuna agreement. On appeal, Kaban argued that the chambers judge erred in making these findings and made comments during the hearing that created a reasonable apprehension of bias. The Court of Appeal dismissed Kaban's appeal, holding that the chambers judge's finding that the Fortuna agreement was inconsistent with the letter agreement was entitled to deference, and that the chambers judge's comments did not raise a reasonable apprehension of bias. Because these conclusions were sufficient to dismiss the appeal, the Court of Appeal declined to address Kaban's arguments on the implied terms.

Kaban has sought leave to appeal the Court of Appeal's decision to the Supreme Court of Canada.[1]

1. Application for leave to appeal filed December 8, 2021 and file opened December 17, 2021, Docket No. 39940.

Prism Resources Inc. v. Detour Gold Corporation, 2021 ONSC 1693

In this decision, the Ontario Superior Court of Justice found that an informal letter agreement asserting that one party would receive a "carried interest" in a mining project was sufficient to create a property interest in the properties on which the project was located.

Prism Resources Inc. is a Canadian-based precious metal explorer and developer which, in 1999, entered into a joint venture agreement with Boliden Westmin (Canada) Limited (Boliden) to develop two properties in northern Ontario. Pursuant to options granted under the joint venture agreement with Boliden, Prism earned a 100% interest in the properties. A few years later, Prism entered into a joint venture agreement with Conquest Resources Inc. (Conquest) to acquire, explore, and, if warranted, develop the properties. Prism and Conquest then entered into a letter agreement, pursuant to which Prism relinquished some of its interest in the properties in exchange for, among other things, a "carried interest in the project equal to seven and one-half per cent (7.5%) of Conquest's net profit from the [properties]."

Between 2010 and 2014, Detour Gold Corporation (Detour) acquired the properties from Conquest through agreements that specifically referenced Prism's interest in the properties. However, in 2017, Detour denied that Prism had an interest in the properties and asserted that any rights it had were simply contractual as against Conquest. Prism brought a motion for summary judgment seeking a declaration that it had a valid and enforceable royalty that amounts to an interest in land in the properties.

The Court applied the two-part test from *Dynex*[2] to determine whether the letter agreement created a property interest. The parties only disagreed about the application of the first branch of the test, i.e. whether the language was sufficiently precise to show that the parties intended for the royalty to grant an interest in the properties. Recognizing that no specific words are required to create an interest in land, the Court looked to the surrounding circumstances and the parties' subsequent conduct to determine whether Prism had an interest in the properties. Although it would have been preferable for Prism to have registered its interest in the properties, the Court held that the parties' intentions demonstrated that such a property interest existed and granted declaratory relief to this effect.

2. *Bank of Montréal v. Dynex Petroleum Ltd.*, 2002 SCC 7.

Article

Good Directions on Good Faith: Updates from the SCC

Jennifer K. Choi

The contractual duty of good faith has taken on increasing importance in the context of business relations in Canada in recent years. Starting with the 2014 case of *Bhasin v. Hrynew (Bhasin)*,[1] wherein the Supreme Court of Canada (SCC) recognized the organizing principle of good faith in contract law, Canadian courts have become more and more comfortable holding parties to a standard of good faith performance of their contractual obligations.

Last winter, the SCC clarified two aspects of the principle of good faith in contract law in *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45 (*Callow*), and *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 (*Wastech*).

Callow and *Wastech* give greater certainty to the edges of the organizing principle of good faith set out in *Bhasin* and provide guidance to parties making decisions and exercising their rights under contracts. Further, both cases confirm that, in Canada, the duty of good faith and honesty in contractual performance is not limited to long-term relational contracts, and the fact that a contract is a long-term relational contract does not change the content of that duty.

Honest Performance

In *Callow*, a group of condominium corporations (Baycrest), managed the joint and shared assets of 10 condominium corporations. In 2012, Baycrest renewed a two-year contract for winter maintenance services with C.M. Callow Inc. (CM Callow). Pursuant to the contract, Baycrest could unilaterally terminate CM Callow's services on 10 days' notice, without cause.

In spring 2013, Baycrest decided that it would terminate the contract early, but did not inform CM Callow. Subsequently, a representative of Baycrest had communications with CM Callow that created the impression that the contract would not be terminated and would possibly be renewed for a longer term. Baycrest was aware that CM Callow had formed an incorrect impression of its position (namely, that the contract would not be terminated), but took no steps to correct the misunderstanding. In September 2013, when it was too late for CM Callow to secure an alternate contract for winter maintenance work, Baycrest gave notice that it was exercising its right to terminate the contract.

The Trial Court held that Baycrest had breached its duty of honesty in contractual performance. The Ontario Court of Appeal reversed the decision, finding that Baycrest's actions did not reach the "high level required to establish a breach of the duty of honest performance."[2]

A five-member majority of the SCC allowed CM Callow's appeal. The majority held that when a party to a contract is aware that its conduct or representations have created a misunderstanding in its counterparty's mind, in relation to the performance of an obligation or exercise of a right under the contract, the duty of honest performance requires that party to correct the misunderstanding.[3]

Specifically, the majority found that the duty of honest performance, which requires that parties not knowingly mislead each other about matters directly linked to the performance of the contract, prohibits not only overt lies but also "half-truths, omissions, and even silence, depending on the circumstances."[4] Further, a party may be liable even if it did not intend for its counterparty to rely on the misleading conduct or representation: "all a plaintiff need show is that, but for its reliance on the misleading representation, it would not have sustained the loss."[5]

For the defendants' breach of the duty of honest performance, the plaintiff is entitled to "expectation damages," that is, "damages [that] … put [the plaintiff] in the position that it would have been in had the duty been performed."[6] In this case, honest performance would have entailed Bayview correcting CM Callow's incorrect belief, allowing CM Callow to have the opportunity to secure another contract.

Callow is a warning to parties that strict compliance with the terms of a contract may not be sufficient to avoid liability. There was no dispute that Bayview had provided CM Callow with the required 10 days' notice under the contract's termination clause. Nonetheless, Bayview was liable for breach of its duty of honest performance, because it knew and failed to correct CM Callow's misapprehension with respect to the contract.[7]

Moreover, it is notable the majority held that silence, absent a positive obligation to speak, could lead to a breach of the duty of honest performance — if the silent party knows that its counterparty has developed a mistaken understanding. Parties must now be cognizant of situations where permissible non-disclosure blurs into dishonesty, particularly in respect of information relevant to termination. Whether a party's silence misleads its counterparty in a manner that is in breach of the duty of honest performance or is mere silence will depend on the specific facts and circumstances of the case.

Good Faith Exercise of Discretion

Wastech involved a waste transportation company (Wastech), and a statutory corporation responsible for the administration of waste disposal for the Metro Vancouver Regional District (Metro). Wastech and Metro

1. *Bhasin v. Hrynew*, 2014 SCC 71.
2. *CM Callow Inc. v. Zollinger*, 2018 ONCA 896 at para. 16.
3. *CM Callow Inc v. Zollinger*, 2020 SCC 45 at para. 99.
4. *Ibid* at para. 92.
5. *Ibid* at para. 146.
6. *Ibid* at paras. 107-109.
7. *Ibid* at para. 114.

had a long-standing contractual relationship which contemplated that Wastech would remove and transport waste to three disposal facilities, one of which is located much farther away from the Metro Vancouver Regional District than the other two. The contract stated that Metro had "absolute discretion" in allocating the amount of waste to go to each facility.

In 2011, Metro's allocation of waste between the three facilities resulted in Wastech recording an operating profit that was less than its target. Wastech alleged that Metro breached the contract by allocating waste in a manner that deprived Wastech of the opportunity to achieve its target profit for the year.

The dispute was referred to arbitration. The arbitrator found that the duty of good faith applied and Metro had breached that duty. On appeal to the British Columbia Supreme Court, the arbitrator's decision was set aside. The British Columbia Court of Appeal dismissed Wastech's appeal.

A six-member majority of the SCC dismissed Wastech's appeal. The majority held that when a party exercises discretion conferred onto it by contract, it must do so in a manner that accords with the purposes for which the discretion was conferred.[8] A party must, therefore, exercise its discretion reasonably, as measured according to the parties' own bargain.[9] Where a party exercises its discretionary power in a manner that "falls outside of the range of choices connected to [the contract's] underlying purpose," it is contrary to the requirements of good faith.[10]

While the intentions of the parties are not relevant to whether the duty applies, they remain critical to whether a particular exercise of contractual discretion is or is not reasonable, because the range of outcomes that are reasonable in light of the purposes of the contract "are ascertained principally by reference to the contract, interpreted as a whole — the first source of justice between the parties."[11] The Court stressed that what is unreasonable is "highly context-specific" and will necessarily require an exercise of contractual interpretation.[12]

The duty of good faith does not require a party to "subvert" or "subordinate" its interests to those of the other party, even when a contract is "a long-term, relational agreement dependent upon an element of trust and co-operation."[13] However, where the exercise of discretion "substantially nullifies or eviscerates the benefit of the contract," this "could well be relevant to show that discretion had been exercised in a manner unconnected to the relevant contractual purposes."[14] In this case, Metro was found to not have exercised its discretion improperly. The majority found that the purpose of the contract was to give Metro the flexibility necessary to maximize efficiency and minimize costs of the operation. There was no guaranteed minimum volume of waste allocated to any facility in a given year.

Prior to *Wastech*, the measure of the standard of good faith in contractual performance was unclear, particularly when it came to the exercise of discretion legitimately granted to a party by contract. It is now clear that there is no such thing as absolute discretion in a contract; it will always be restricted by what is reasonable in light of the purpose of the contract.

Although parties do not have the ability to contract out of the duty of good faith, the duty to exercise contractual discretion in good faith is modest and dependent on the text and context of the contract. Parties can define the purposes for which a discretion is granted through clear contractual provisions.

The Importance of Good Faith

Since 2014, the question of what good faith in contractual performance means has become a frequent question before courts and tribunals. *Callow* and *Wastech* highlight that, in Canadian law, good faith in contract law applies to all contracts, irrespective of the intentions of the parties. Further, they are important decisions that can help parties navigate the complexities of their contractual relations. *Callow* offers important guidance about how parties to contracts must conduct themselves in good faith when carrying out or terminating a contract. *Wastech* clarifies the nature and scope of the duty to exercise discretionary contractual powers in good faith.

From a risk management perspective, companies entering into contracts with discretionary provisions will want to clearly identify the scope of those discretionary rights before proceeding and understand what is reasonable and fair under the contract. Drafting contractual recitals (which often provide important background and context) and managing and maintaining evidence of the purpose underlying the contract, will also have heightened importance.

8. *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 at paras. 68-70.
9. *Ibid* at para. 71.
10. *Ibid* at para. 71.
11. *Ibid* at para. 75.
12. *Ibid* at para. 76.
13. *Ibid* at paras. 102, 107.
14. *Ibid* at para. 84.

Case Law Summaries

Criminal Law

Lindsay Burgess and Daniel Thomas

R. v. Land Petroleum International Inc., 2021 ABPC 76

In this decision the Provincial Court of Alberta found Land Petroleum International Inc. guilty of the rarely prosecuted offence of failing to permit or assist an inspection by the Alberta Energy Regulator (Regulator), pursuant to s. 96(4) of the *Oil and Gas Conservation Act* (Act).

Pursuant to the Act, the Regulator, and any person authorized by it, may enter and inspect any place used or occupied in connection with a well or place where oil or gas is refined, produced, handled, processed or treated. All persons are required to permit and assist the Regulator in such inspections. Failing to fulfil this statutory duty is an offence under the Act.

The Court found that Land Petroleum failed to afford Regulator inspectors access to its gas plant facility on numerous occasions, culminating in the sole director and majority shareholder of Land Petroleum (Mr. Fung) informing the Regulator that: (i) he did not recognize their authority to inspect the facility; (ii) they would have to obtain a search warrant to access the facility; and (iii) he would report them to the RCMP if they attempted to enter the facility. Ultimately, the Regulator obtained access to the facility through an open gate, conducted their inspection, and found 22 non-compliance infractions.

While the Court noted that the Regulator's inspection was delayed, not prevented, the delay was sufficient for the Court to find that Land Petroleum breached its statutory duty to permit or assist the inspection when Mr. Fung refused to grant the Regulator access to the facility. Land Petroleum was therefore guilty of the offence charged under the Act. In a separate sentencing decision, Land Petroleum was ordered to pay a C$92,000 fine for this offence (2021 ABPC 87).

For more on this case see McCarthy Tétrault LLP's *Canadian ERA Perspectives* blog post entitled "The Offence of Failing to Assist an Inspection – R. v. Land Petroleum International Inc., 2021 ABPC 76."

R. v. Pavao, 2021 ONCA 527

In this decision, the Ontario Court of Appeal allowed, in part, Mr. Pavao's appeal from conviction and sentencing for fraud arising from a fraudulent investment scheme concerning the sale of shares in gold mining companies. We reported on the conviction and sentencing decisions in *Mining in the Courts*, Vol. IX.

Mr. 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 company but received nothing in return. Meanwhile, Mr. Pavao acquired real shares in the mining companies and earned a profit. Mr. Pavao was convicted of 10 counts of fraud (one for each of the 10 complainant investors) and one count of defrauding the public, and he was sentenced to five years' imprisonment and ordered to pay restitution in the amount of C$1,100,799, with a fine in lieu of forfeiture in the same amount.

On appeal, Mr. Pavao argued that the convictions were based on misapprehensions of the evidence by the trial judge, leading to unreasonable verdicts and a miscarriage of justice. Mr. Pavao also argued that the delay in bringing him to trial violated his rights under s. 11(b) of the *Canadian Charter of Rights and Freedoms* (Charter). In respect of sentence, Mr. Pavao argued that the trial judge erred in ordering restitution and a fine in lieu of forfeiture in respect of two investors who were not complainants in the case against him.

The Court of Appeal held that the evidentiary record supported the trial judge's findings of guilt on the Rubicon and Africo fraud counts and dismissed the appeal against conviction. However, in respect of the sentencing appeal, because the Crown had conceded the alleged sentencing error, the Court had little difficulty in ruling that the trial judge had erred in ordering restitution and a fine in lieu of forfeiture in respect of investors who were not complainants in the case against Mr. Pavao. The Crown had not sought to prove fraud in relation to certain losses and therefore these losses were not "as a result of" a proven offence for purposes of the restitution order. Accordingly, the sentence appeal was allowed and the total amount of both the restitution and the fine order reduced.

Finally, with regard to Mr. Pavao's ground of appeal based on s. 11(b) of the Charter, both the appellant and the Crown agreed that it was an error for the application judge not to make attributions of delay according to the framework in *R. v. Morin*, [1992] 1 S.C.R. 77. The Court of Appeal proceeded to make the attributions of delay and concluded that the combined Crown and institutional delay in this case was 17 months, which fell within the *Morin* guideline. There were no other *Morin* considerations that affected the reasonableness of the delay. Therefore, despite the application judge's failure to attribute delay in the dismissal of Mr. Pavao's s. 11(b) application, there was no reversible error in his conclusion that the delay did not violate Charter rights.

R. v. Teck Coal Limited, 2021 BCPC 118

In this decision, Teck Coal Limited was ordered to pay C$60 million for unlawfully depositing a deleterious substance into water frequented by fish contrary to s. 36(3) of the *Fisheries Act*. Although the penalty is the highest ever imposed for this kind of violation, it represented the Court's acceptance of a joint sentencing submission and illustrates the potential impact of corporate social responsibility and co-operation with investigators.

The charges stem from Teck's coal mining operations in the Elk Valley in southeastern British Columbia at the Greenhills and Fording River mines in 2012. The Clode Settling Ponds had been constructed in 1971 to minimize sediment deposits in the Fording River from Teck's coal mining operations. While not intended as fish habitat, the measures to exclude fish from the ponds were not effective or well-maintained, and the Westslope Cutthroat trout, a provincial and federal "species of concern," frequently made their way into the ponds. Environment and Climate Change Canada conducted a multi-week sampling and testing program in 2012 and discovered that some of the fish had selenium concentrations at levels associated with adverse effects. They also observed harmful calcite deposits in the Fording River and related tributaries.

Teck admitted that it committed the offences by permitting coal waste rock leachate to be deposited in the Clode Settling Pond and Fording River over the period January 1 to December 31, 2012, and that it did not exercise due diligence to prevent the deposit of these deleterious substances, nor did it have a comprehensive plan in place at the time to deal with such deposits. However, Teck had regularly reported the rates and constituents of the deposits to the authorities prior to and during the offence period. It also entered early guilty pleas, saving years of court time, and provided significant co-operation throughout the investigation. Since 2012, Teck had also spent substantial sums to address the adverse environmental effects of the waste rock from its mines.

While the fine in this case represents the highest imposed to date, it amounted to a fraction of the maximum C$1 million per day that could have been ordered. In accepting the joint submission, the Court noted that while the penalties would be a significant deterrent, they also reflected the substantial efforts made by Teck to address environmental concerns and its good corporate character.

Case Law Summaries

Environmental Law

Caroline-Ariane Bernier, Lindsay Burgess, Alexis Hudon, Charles- Étienne Presse, and Janie L.-Roy

Altius Royalty Corporation v. Alberta, 2021 ABQB 3

In this decision, the Alberta Court of Queen's Bench summarily dismissed the plaintiffs' action, finding that the 2018 amendments to the *Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations*, SOR/2012-167 (Regulations) were not an expropriation or "taking" of the plaintiffs royalty interest in a coal mining facility.

In 2014, the plaintiffs acquired a 9% royalty interest in the coal used by the Genesee Power Plant from the adjacent coal mining facility pursuant to a dedication agreement. The Genesee Power Plant consists of three units commissioned in 1989, 1994 and 2005. As these units were neither "new units" nor "old units" within the meaning of s. 3(1) of the Regulations adopted in 2012, they were not bound by the emission standard therein and would be permitted to operate from an emissions perspective for 50 years from their commissioning dates. Therefore, the Plaintiffs had counted on their royalty stream from the three units being available until 2039, 2044 and 2055 respectively.

In 2018, amendments to the Regulations came into force that affected existing plants, such as the Genesee Power Plant, and required that they meet the new emissions standard by December 31, 2029. While the regulations impacted coal-fired plants directly, the effects upon coal suppliers were collateral. The Plaintiffs brought this action alleging that the 2018 amendments to the Regulation amounted to a constructive expropriation or "taking" by Canada of its royalty interest after 2030. They also alleged that Alberta engaged in conduct amounting to a "taking" by entering into an "off-coal agreement" with compensation to Capital Power LP, the owner and operator of the plant, effectively ending the coal-fired operation of the Genesee Power Plant after 2030.

The Court summarily dismissed the action, finding that there was no "taking" of the Plaintiffs' royalty interest. For a *de facto* taking requiring compensation, two criteria must be met: (i) there must be an acquisition of a beneficial interest in the property or flowing from it; and (ii) there must be removal of all reasonable uses of the property. The Court referred to *R. v. Tener*,[1] in which a taking was found where a mineral claim holder in Wells Gray Park was adversely affected by a change of government policy that resulted in the refusal to grant permits for surface rights so that mineral rights could not be exploited. However, the Court distinguished *Tener* because the Plaintiffs' claim in this case largely relied on the assumption that the regulation of coal emissions would not change for 50 years after the Regulations were initially brought into force in 2012. The Plaintiffs were effectively trying to bind subsequent governments to the regulatory regime present at the time that it acquired its royalty interest in 2014. The Court concluded that the Plaintiffs invested in a regulated industry with full knowledge that it was a regulated industry and the actions by Canada and Alberta did not amount to takings or actionable wrongs.

1. [1985] 1 SCR 533.

R. v. ArcelorMittal Canada Inc., 2021 QCCQ 10578

In this decision, the Court of Québec considered the definition of "deleterious substance" in the context of s. 36 of the federal *Fisheries Act* (Act), which prohibits the discharge of a deleterious substance into water frequented by fish.

ArcelorMittal Exploitation Minière Canada (ArcelorMittal) is a general partnership that operates an iron mine. ArcelorMittal was charged under the Act for discharging effluent with a concentration of suspended solids that exceeded the allowable limit under the *Metal and Diamond Mining Effluent Regulations* (Regulations). ArcelorMittal tested samples of its effluent weekly. When, during the same week, one sample violated the Regulations and another did not, ArcelorMittal only reported the compliant sample to Environment and Climate Change Canada.

The Crown argued that the mere discharge of suspended solids was sufficient to commit the offence, regardless of their concentration, because suspended solids are a deleterious substance under the applicable regulation. The Crown further argued that the accused must prove that the concentration of suspended solids discharged does not exceed the prescribed limit. The Court rejected this interpretation of the Act and Regulations and held that the Crown must prove beyond any reasonable doubt that the prescribed concentration of suspended solids has been exceeded to establish that the offence has been committed.

ArcelorMittal argued that the Regulations only require the collection of one sample per week and that, because the additional samples were taken and tested voluntarily, they did not have to be disclosed and could not be used as evidence. The Court disagreed and held that all samples were subject to the Regulations, had to be reported, and could be used as evidence by the Crown.

The Court further found that the Crown had established all of the essential elements of the offence and that ArcelorMittal had not been diligent. Even though ArcelorMittal's operations involve a specialized activity in a highly regulated environment where contravention of regulations is severely punished, no corrective measures were taken in the face of suspended solids concentration exceeding the prescribed limit and no clear internal procedures were implemented for communicating concentration exceedances.

ArcelorMittal sought leave to appeal the decision (2021 QCCA 1928), and the Québec Court of Appeal granted leave in part.

Article

Race to the Top: The Rise of ESG and the Emergence of a Global Sustainability Disclosure Standard

Selina Lee-Andersen

As the global economy stirs from its pandemic slumber, the rise of environmental, social and governance (ESG) investing has quickly become not only a focus of business discourse, but also an action item for organizations across sectors. For the mining sector, environment and social issues are seen as a top risk in 2022.[1] As ESG issues figure more prominently into investment decision-making processes, as well as shareholder and stakeholder interests, mining companies are working to integrate ESG into business strategies, daily operations and corporate disclosure. Stakeholder concerns over issues such as water management, biodiversity and community engagement are also driving mining companies to prioritize these issues in their operations and project management planning. Navigating ESG is increasingly challenging, given the breadth of issues the mining sector continues to face, coupled with the myriad of reporting standards they need to adhere to.

Two years in, the COVID-19 pandemic has exposed vulnerabilities in the economy as governments and industry manage the impacts of lockdowns and changes in consumer behaviour. The need for more responsive risk management approaches has put a spotlight on ESG as an important factor not only in creating value for organizations, but also enabling them to be nimbler in dealing with risks to business, such as climate change. In particular, the pandemic has highlighted the need to quantify and manage these risks. Diversity and inclusion are also being increasingly seen as essential to boosting the value of companies.

As ESG factors play an increasingly important role in assessing credit and market risk, investors are looking for more meaningful information. This highlights the need for consistency in disclosure standards. Part of the challenge for stakeholders is the sheer number of existing frameworks and voluntary standards for ESG reporting, some of which overlap but are not directly comparable. As a result, investors and other stakeholders have been calling for regulators to harmonize and streamline ESG disclosure standards. The launch of several disclosure initiatives demonstrates the priority that stakeholders have placed on consolidating such standards. This article provides an overview of ESG and the leading ESG standards, as well as an update on efforts to establish a common global standard for ESG.

ESG – A Primer

The Financial Times Lexicon describes ESG as "a generic term used in capital markets and used by investors to evaluate corporate behaviour and to determine the future financial performance of companies."[2] ESG criteria are non-financial factors that investors apply as part of their evaluation process to identify material risks and growth opportunities, and to assess the future financial performance of companies. ESG factors are increasingly being taken into account alongside financial factors in the investment decision-making process. The components of the ESG triptych can be described as follows:

- Environmental criteria consider how a company performs as a steward of nature.
- Social criteria examine how a company manages relationships with employees, customers, suppliers, and local communities.
- Governance criteria look at company leadership, executive pay, audits, internal controls, and shareholder rights.

The term "ESG investing" refers to a class of investments that seek positive returns and long-term impacts on society, environment, and the performance of the business. ESG investing is also known as socially responsible investing, sustainable investing, impact investing, values-based investing, or mission-related investing.

While ESG metrics are not commonly part of mandatory financial reporting, companies are increasingly making ESG disclosures in their annual reports or in stand-alone sustainability reports. In recent years, there has been a proliferation of ESG reporting frameworks worldwide, which has created competing standards and additional reporting burdens for companies. In the push for a globally accepted ESG reporting standard, the new International Sustainability Standards Board (ISSB) has emerged as the front-runner to take up the mantle of being the global baseline for sustainability disclosure standards that meet the information needs of investors. The ISSB and other leading standards are discussed in further detail below.

Is ESG the Same as CSR?

Corporate social responsibility (CSR) has its roots in corporate philanthropy, which can be traced back to the early 20th century. According to the Association of Corporate Citizenship Professionals, CSR began to take hold in the United States in the 1970s, when the concept of the "social contract" between business and society was declared by the Committee for Economic Development in 1971. The social contract flows from the idea that business functions because of public "consent," therefore business has an obligation to constructively serve the needs of society. This consent is often referred to today as a "license to operate;" CSR marked the starting point for businesses taking ownership of their impact on society.

1. According to the report by EY, Top 10 Business Risks and Opportunities for Mining and Metals in 2022 (October 2021) at p. 2, mining and metals companies ranked environment and social issues as their number one risk in 2022.
2. Financial Times Lexicon, "ESG," available at https://markets.ft.com/glossary/searchLetter.asp?letter=E.

While ESG has its origins in CSR, the two concepts can be distinguished from one another. CSR seeks to make a business accountable for its activities, while ESG criteria make its efforts measurable. CSR activities vary greatly between businesses and sectors, so no standard metrics have been developed. Rather, CSR is often just an add-on to a company's mission and overall business direction. On the other hand, ESG activity is quantifiable to a much greater degree. For example, ESG scores and ratings such as the World's Most Ethical Companies and the Global 100 have been developed, and targets are set and reported on. Metrics can be applied to how companies treat their employees, manage supply chains, respond to climate change, increase diversity and inclusion and build community relationships.

ESG and the Mining Sector

Although ESG has recently emerged as a hot topic, the concept is not new to the mining sector. In the 1980s, the framework for ESG was health, environmental management, and safety and loss prevention. In essence, it was what companies were doing to protect their employees and meet compliance obligations. In the 1990s, the concept of social licence emerged. Fast forward to today and ESG encapsulates a broad range of issues including environmental stewardship, health and safety, transparency, ethics, supply chains, social performance, local procurement and human rights. What continues to evolve is how companies are being asked to validate and measure performance, provide assurances on the quality of this information and explain, ultimately, how this information is being communicated to a broad set of stakeholders.

Given the diversity of ESG reporting frameworks, adopting the appropriate disclosure standard can be overwhelming for companies. Some of the leading standards in the mining industry include the International Council on Mining & Metal's (ICMM) Mining Principles, United Nations (UN) Guiding Principles on Business and Human Rights, Extractive Industries Transparency Initiative and the World Gold Council's Responsible Gold Mining Principles. Each of these standards takes a slightly different approach to what is important in ESG disclosure.

Leading ESG Standards

As noted above, there are a number of existing frameworks and voluntary standards for ESG reporting. Before proceeding, it is important to distinguish between sustainability frameworks and sustainability standards, which are complementary to one another: (i) frameworks provide principles-based guidance on how information is structured, how it is prepared, and what broad topics are covered; and (ii) standards provide specific, detailed, and replicable requirements for what should be reported for each topic, including metrics.

For the mining sector, some of the leading ESG standards include:

- ICMM's 10 Mining Principle, which define good ESG practice through a set of performance expectations. The principles address ethical business practices, sustainable development in decision-making, human rights, risk management, health and safety, environmental performance, biodiversity, responsible production, social performance, and stakeholder engagement. ICMM's *Assurance and Validation Procedure* reinforces commitments to transparency, and ensures the credibility of reported progress. ICMM has also developed a number of useful tool kits focused on social performance, communities, economic development, governance and transparency.
- The UN Guiding Principles on Business and Human Rights, which constitute the global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity, and they provide the internationally accepted framework for enhancing standards and practices with regard to business and human rights.
- The Extractive Industries Transparency Initiative (EITI), which implements the global standard to promote the open and accountable management of oil, gas and mineral resources. The EITI Standard requires the disclosure of information throughout the extractive industry supply chain from the point of extraction and how revenues make their way through the government to how they benefit the public. In each of the 56 implementing countries, EITI is supported by a coalition of governments (including Canada), companies, and civil society.
- The Responsible Gold Mining Principles (RGMPs), which provide a clear framework as to what constitutes responsible practices for gold mining. The RGMPs are intended to recognize and consolidate existing standards and instruments under a single framework. A number of leading standards already exist that address specific aspects of responsible gold mining, including the ICMM's Performance Expectations, UN Guiding Principles on Business and Human Rights, Extractive Industries Transparency Initiative, and OECD Due Diligence Guidance for Responsible Business Conduct.

Given the complexities of navigating multiple standards with different criteria, there have been calls from industry more broadly to establish common metrics for the purposes of consistent ESG reporting and sustainability value creation. Currently, there are several initiatives underway to establish a universally accepted ESG reporting standard, including the World Economic

Forum International Business Council's (IBC) Stakeholder Capitalism Metrics, the Impact Management Project, Global Reporting Initiative (GRI) Standards, and the standards of the Sustainability Accounting Standards Board (SASB).

ISSB Emerges as the Global Standard

As world leaders met in Glasgow for the COP26 climate conference in November 2021, the trustees of the IFRS Foundation (the non-profit organization established to develop a single set of globally accepted accounting and sustainability disclosure standards known as the IFRS Standards) announced the formation of a new International Sustainability Standards Board (ISSB) to develop a comprehensive global baseline of sustainability disclosure standards to meet the information needs of investors. In addition, the IFRS Foundation announced a commitment by leading sustainability disclosure organizations to consolidate into the new board. Specifically, the IFRS Foundation will complete consolidation of the Climate Disclosure Standards Board (CDSB) and the Value Reporting Foundation (which houses the Integrated Reporting Framework and the SASB Standards) by June 2022. Following the consolidation of standards in June 2022, the ISSB will house the convergence of ESG frameworks and standards produced by these organizations. The Technical Readiness Working Group (TRWG) (formed by the IFRS Foundation to undertake preparatory work for the ISSB) has published two prototypes for climate and general disclosure requirements. The Climate Prototype sets out the requirements for the identification, measurement and disclosure of climate-related financial information, while the General Requirements Prototype sets out the overall requirements for disclosing sustainability-related financial information relevant to the sustainability-related risks and opportunities faced by the organization. The prototypes set out recommendations prepared by TRWG for consideration by the ISSB. Until the ISSB's own standards are published, organizations are encouraged to continuing using, among others, the CDSB and SASB Standards.

The Road Ahead

The ISSB announcement represents a significant development in the move toward a globally accepted set of standards for ESG-related disclosures. The development of such standards will bring much sought-after consistency to climate- and sustainability-related disclosures. The development of a single set of globally accepted standards will also help to streamline reporting requirements for companies looking to make meaningful disclosures to its investors, shareholders and other stakeholders.

Along with Frankfurt (Germany), Montréal has been selected to host the offices for the ISSB. The ISSB is expected to commence its review of the prototypes and other TRWG recommendations in early 2022, following which the ISSB will release its first proposed standards for public consultation. The aim is to finalize the ISSB disclosure standards by the end of 2022. The ISSB standards will be developed in such a way that adopting jurisdictions may mandate their use by reporting entities. Whether to make the ISSB standards mandatory will be up to each individual jurisdiction adopting their use. Among those welcoming the ISSB standards include finance ministers and central bank officials from Canada, the United Kingdom, the European Commission, the United States, France, Germany, India, China, Russia, South Korea, Netherlands, and Switzerland.

Case Law Summaries

Labour and Employment

Caroline-Ariane Bernier, Alexis Hudon, Justine Lindner, Charles-Étienne Presse, and Janie L.-Roy

The Director of Employment Standards v. Employment Standards Board, 2021 YKSC 28

In this case, the Supreme Court of Yukon upheld a decision by the Employment Standards Board (Board) concerning an overtime averaging agreement for employees required to self-isolate for 14 days prior to working for six weeks in a Yukon mine.

Orica Canada Inc. provided mineworkers to a company operating a gold mine north of Mayo, Yukon. In March 2020, the Yukon government formally declared a state of emergency in response to the COVID-19 pandemic. As a result of the declaration, all individuals travelling into Yukon were required to self-isolate for 14 days. As workers employed by Orica lived outside Yukon, they were required to spend two weeks in a hotel each time they went to Yukon for work. While they were in self-isolation, they were paid their regular wages. After the two-week period, the workers would work for 28 days and then receive six weeks off. The affected employees consented to this arrangement.

Orica applied to the Director of Employment Standards (Director) to approve an averaging agreement of the six-week-on, six-week-off arrangement under Yukon's *Employment Standards Act* (Act). At the time of the application, Orica assumed that the two-week self-isolation period was "work," which in turn required them to apply for approval of the averaging agreement. The Director refused the application, holding that any averaging agreement of a duration longer than eight weeks was in violation of the *ESA* and that a 12-week averaging agreement was "too great a compromise of employees' minimum standards."

Orica appealed to the Board and argued, for the first time, that the two-week period was not "work" so that the averaging agreement would be for a period of eight weeks, as opposed to the 12 weeks relied on by the Director. The Board granted the appeal and agreed with Orica that the 14-day self-isolation period was not "work" under the ESA, but rather a "readiness period". Given the unprecedented nature of the pandemic, the Board noted that the Director's decision was not reasonable, and the public health emergency required "out-of-the-box" thinking and flexibility by employees, employers, and the Director.

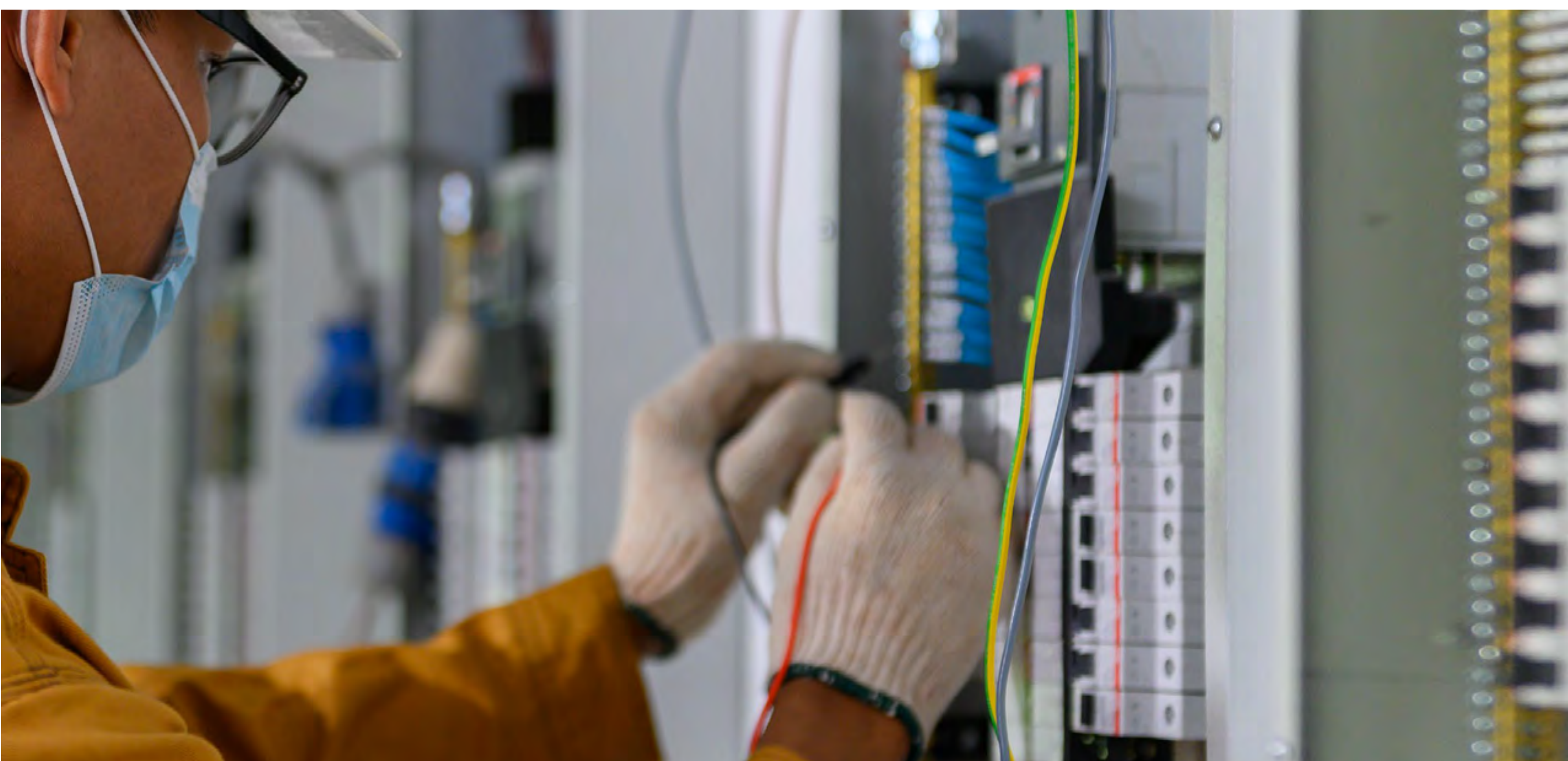
In its judicial review of the Board's decision, the Supreme Court of Yukon affirmed the Board's reasoning and noted that, because the Act did not define the term "work," the Board's approach was reasonable given the legal and factual context.

Unifor Local 892 v. Mosaic Potash Esterhazy Limited Partnership, 2021 SKQB 8

In this case, the Court of Queen's Bench for Saskatchewan granted an application for judicial review of an arbitrator's interpretation of a union's collective agreement with Mosaic Potash Esterhazy Limited Partnership (Mosaic).

Mosaic, a unionized employer that operates a potash mine in Saskatchewan, determined that it needed to contract some repair work out to a third-party contractor. Article 25.03 of Mosaic's Collective Agreement with Unifor Local 892 (the Union) required Mosaic to give prior written notification of the reasons for contracting out if it became necessary to do so. On January 7, 2016, Mosaic entered into a contract with South East Construction L.P. to complete the repair work and sent notice to the Union to that effect. The Union filed a grievance on the basis that the notice simply indicated that the work had been contracted out and did not provide reasons. At the arbitration, the arbitrator concluded that Mosaic had given proper notice. The Union then brought an application for judicial review of the arbitrator's decision.

The Court held that the arbitrator's decision was unreasonable. In so holding, the Court found that the arbitrator improperly interpreted Article 25.03, which required Mosaic to provide express reasons for contracting out prior to the commencement of the work. Mosaic's notification only set out the scope of the work to be performed and was silent as to the reasons for contracting out. Although Mosaic eventually provided its reasons on January 12, 2016, the day after the contractors began work, this was insufficient for the purposes of Article 25.03. The Court remitted the matter to the arbitrator for further consideration.



Wist v. International Brotherhood of Electrical Workers, Local 424, 2021 AHRC 176

In this decision, the Alberta Human Rights Tribunal dismissed a request for a review of the Director of the Alberta Human Rights Commission's decision to dismiss a complaint brought by an employee, Sheldon Wist (the Complainant), against his union, International Brotherhood of Electrical Workers, Local 424 (the Respondent). The Complainant alleged that a failure to dispatch him to a work site following a non-negative drug test in 2016 amounted to discrimination on the grounds of physical and mental disability.

The Complainant was employed by an electrical construction and electrical maintenance company in a safety-sensitive position. The workplace was governed by two collective agreements that incorporated and applied the drug and alcohol guidelines found in the Canadian Model for Providing a Safe Workplace and the Rapid Site Access Program (together, the Drug and Alcohol Guidelines). Employees who are in compliance with the Drug and Alcohol Guidelines are classified as "active" and can be dispatched by the Respondent to work sites. When an employee tests non-negative on a drug test, the employee is referred to a third-party contractor responsible for providing substance abuse expert treatment recommendations designed to return non-compliant employees to active status. Failure to adhere to the third-party contractor's rehabilitation program results in the employee remaining classified as "inactive."

After receiving a non-negative on a drug test, the Complainant was referred to the third-party contractor's rehabilitation program. The Complainant did not complete the rehabilitation program and argued that the third-party contractor had labelled him as an addict and forced him to attend programming that was not appropriate for his medical conditions. The Complainant explained that he did not continue with the rehabilitation program because he later obtained a prescription for medical cannabis to deal with his medical issues. No evidence was tendered by the Complainant that showed that he presented the new prescription to the third-party contractor or sought a reassessment of the rehabilitation program.

The Tribunal upheld the Director's decision to dismiss the complaint, finding that the Respondent was acting in accordance with its obligations under the Collective Agreements in referring the Complainant to the third-party contractor. Moreover, the Tribunal found that, even where a referral may have a discriminatory result or adverse impact on individuals with addictions or those using medical cannabis, drug and alcohol policies designed to protect workers at safety-sensitive sites are legitimate restrictions, provided accommodations are made for workers using medically prescribed drugs.

Commission des normes, de l'équité, de la santé et de la sécurité du travail v. Iamgold Corporation, 2020 QCCQ 7785

In this decision, the Court of Québec found that a mining company had violated s. 35 of the *Regulation Respecting Occupational Health and Safety in Mines* (the Regulation) following a rock slide because the injured employee was unaware of the consequences of following the improper procedure.

An employee was injured by a rock slide at the Westwood Mine, which is operated by Iamgold Corporation (Iamgold). The Commission des normes, de l'équité, de la santé et de la sécurité du travail (Commission) accused Iamgold of having violated s. 35 of the Regulation on the basis there were loose rocks on the walls of an underground excavation tunnel. Employees drilled 11 holes without installing bolts for the retaining fence (off-drilling), which would have prevented rocks from falling on them.

Iamgold claimed that it acted diligently and had taken all reasonable precautions to avoid commission of the offence. The Court outlined the test applicable to such due diligence defences, which require a defendant to establish that it fulfilled its duties of (i) foresight: giving clear instructions and ensuring that such instructions are understood and followed; (ii) efficiency: implementing effective and concrete measures to eliminate risks to the health and safety of employees; and (iii) authority: furthering a corporate culture that is intolerant of dangerous conduct and sanctions employees who violate rules and procedures. The Court noted that Iamgold is subject to increased standards of due diligence because its activities are specialized and involve high risks to the health and safety of its employees.

The Court determined that Iamgold had not fulfilled its duty of foresight. Despite having been employed for several years by Iamgold, the injured employee was unaware of the consequences of not following the procedure in question. The Court further determined that Iamgold had not fulfilled its duty of authority. Although Iamgold had an administrative sanctions policy, it was clear that Iamgold's employees did not understand the applicable sanctions. The Court found that this explained, in part, why the employee admitted to having off-drilled several times since he started working for Iamgold.

Article

Mandatory Vaccination Policies in the Workplace: Legislative Developments and Enforceability

Justine Lindner, Ben Ratelband, and Alex Treiber

Employers across the country, including the mining industry, have had to grapple with a turbulent two years of managing COVID-19 in the workplace. In the initial days of the pandemic, employers were focused on topics such as remote work, work refusals, constructive dismissal, mass layoffs, face coverings and mask compliance. Over the course of the last number of months the focus has shifted — thanks to the rapid advent of COVID-19 vaccines — to the implementation of vaccination policies in the workplace.

Public health guidance and legal requirements regarding workplace vaccination policies are constantly evolving. This article provides a snapshot of the current situation regarding workplace vaccination policies in Canada.

Legislative Developments on Workplace Vaccination Policies

To date, no province has created an express legislated requirement that all workplaces have a mandatory workplace vaccination policy. However, under each province's occupational health and safety regime, employers have a duty to ensure the health and safety of workers.[1] In the context of COVID-19, this requires employers to ensure the implementation of sufficient health and safety measures to prevent the spread of COVID-19, including vaccination policies.

While no province has required mandatory vaccination in *all* workplaces, the federal government has announced the intention to propose regulations under Part II of the *Canada Labour Code* to make vaccination mandatory in federally regulated workplaces.[2] Some provinces have mandated workplace vaccination policies for specific types of workplaces, such as health-care settings and long-term care facilities, due to the heightened risks of transmission within such settings.[3]

Workplace vaccination policies may be indirectly mandated by legislation. As an example, in Ontario, pursuant to s. 2 of Step 3 — Schedule 1 of *O. Reg. 364/20: Rules for Areas at Step 3 and at the Roadmap Exit Step* under *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*,[4] all Ontario businesses must comply with the recommendations of their regional public health units regarding workplace vaccination policies. Subsequently, many public health units issued recommendations for workplace vaccination policies (the list currently includes: Toronto, Ottawa, York, Peel, Durham, Halton, Middlesex-London, Hamilton, Sudbury, Windsor-Essex, Chatham-Kent, Simcoe-Muskoka, Peterborough, Grey-Bruce). In effect, O. Reg 364/20 has ostensibly required workplaces to implement vaccination policies, however, the responsibility as to whether a policy will be a requirement is left to the discretion of local public health authorities.

Alberta has taken active steps to ensure that mandatory vaccination is not within the arsenal of legislative action. In April 2021, Alberta removed the authority to mandate vaccinations under the *Public Health Act* with Bill 66, the *Public Health Amendment Act*, 2021.[5]

Despite the absence of provincial legislation requiring mandatory vaccination for all workplaces, some provinces and the federal government have taken steps to lead by example by implementing mandatory vaccination policies for public service workers.[6]

Proof of vaccination regimes have swept across Canada, requiring patrons of specific businesses and services to show proof of vaccination in order to gain entry. Notably, these requirements are not applicable to employees. However, when considering an employer's obligations under occupational health and safety legislation, it remains important to consider the need for such policies, especially when balancing both privacy and human rights interests.

Currently, a number of Human Rights Commissions have released statements regarding the enforceability of vaccine mandates and proof of vaccination requirements, emphasizing the objective of protecting people at work, especially vulnerable people, the importance of providing reasonable accommodations and ensuring non-discrimination on the basis of protected grounds under their respective human rights codes (religion, physical or

1. *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, s. 25(2)(h); *Workers Compensation Act*, R.S.B.C. 2019, c. 1, s. 25(a); *Occupational Health and Safety Act*, R.S.A. 2020, c. O-2.2, s. 3(1).
2. Government of Canada, "Government of Canada will require employees in all federally regulated workplaces to be vaccinated against COVID-19," December 7, 2021, available online at: https://www.canada.ca/en/employment-social-development/news/2021/12/government-of-canada-will-require-employees-in-all-federally-regulated-workplaces-to-be-vaccinated-against-covid-19.html.
3. Government of Ontario, "Minister's Directive: Long-term care home COVID-19 immunization policy," December 15, 2021, available online at: https://www.ontario.ca/page/ministers-directive-long-term-care-home-covid-19-immunization-policy.; Ontario Newsroom, "Ontario Makes COVID-19 Vaccination Policies Mandatory for High-Risk Settings," August 17, 2021, available online at: https://news.ontario.ca/en/release/1000750/ontario-makes-covid-19-vaccination-policies-mandatory-for-high-risk-settings; *Hospital and Community (Health Care and Other Services) COVID-19 Vaccination Status Information and Preventive Measures – November 18, 2021*, pursuant to ss. 30, 31, 32, 39(3), 53, 54(1)(k), 56, 57(1), 67(2) and 69 of the *Public Health Act*, SBC, 2008, available online at: https://www2.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/covid-19/covid-19-hospital-and-community-vaccination-status-information-preventive-measures.pdf.
4. S.O. 2020, c. 17.
5. Legislative Assembly of Alberta, "Bill 66, Public Health Amendment Act, 2021," Second Session, 30th Legislature, 70 Elizabeth II, available online at: https://docs.assembly.ab.ca/LADDAR_files/docs/bills/bill/legislature_30/session_2/20200225_bill-066.pdf.
6. Global News, "Ontario Public Service employees will need COVID-19 vaccines or regular tests," August 19, 2021, available online at: https://globalnews.ca/news/8126725/covid-ontario-government-workers-vaccines-tests/; British Columbia Government News, "Proof of vaccination for B.C. public service to increase workplace confidence, stop spread," October 5, 2021, available online at: https://news.gov.bc.ca/releases/2021FIN0055-001915; Alberta Government News, "New vaccination policy for Alberta Public Servants," September 30, 2021, available online at: https://www.alberta.ca/release.cfm?xID=79917372CAAE4-A799-9E9B-C3F39550E2141819.; Government of Canada, "COVID-19 vaccination requirement for federal public servants," November 30, 2021, available online at: https://www.canada.ca/en/government/publicservice/covid-19/vaccination-public-service/vaccination-requirements.html.

mental disability, etc.). It is clear in all of these statements that personal preference is not a Code-protected ground in any jurisdiction.[7]

Courts and Arbitrators Consider Mandatory Vaccination Policies

Ontario courts and arbitrators have addressed several claims regarding the enforceability of vaccination policies. To date, courts have generally been faced with requests for injunctive relief, whereas arbitrators have generally been faced with claims assessing the merits and overall enforceability of the policies.[8]

Despite an initial granting of an interim injunction in *Blake v. University Health Network*,[9] Ontario courts have refused to grant injunctive relief in two recent cases: (i) *Blake v. University Health Network*,[10] and (ii) *Amalgamated Transit Union, Local 113 v. Toronto Transit Commission* and *National Organized Workers v. Sinai Health System*.[11]

Given the nature of a request for injunctive relief, these decisions turned on procedural elements, rather than the merits of the claims. Ontario courts have generally come to the same conclusion in refusing to grant an injunction. Refusal has been based on three core reasons: (i) failure to show irreparable harm; (ii) the balance of convenience favours employer's policies; and (iii) the courts lack jurisdiction to intervene. It has been repeatedly held that unjust termination is insufficient to show irreparable harm as courts and arbitrators have the power to compensate and remedy the harm through reinstatement. The balance of convenience has favoured employers' policies, as they protect workplace and community health and safety. Lastly, courts have held that there is a lack of legislative gap to warrant exercising their residual jurisdiction, as labour relations legislation provides sufficient avenues for expedited adjudication and remedies.

Federal courts and arbitrators have addressed the issue of granting injunctive relief to mandatory vaccination claims in a similar fashion to Ontario courts. The Federal Court in *Lavergne-Poitras v. Canada (AG) and PMG Technologies (Lavergne-Poitras)*[12] and *Wojdan v. Canada (AG)*[13] and the Arbitral Tribunal in *Canada Post Corporation v. Canadian Union of Postal Workers (Canada Post)*[14] refused to grant injunctive relief for the enforcement of mandatory vaccination policies. In all three cases, it was held that irreparable harm could not be established by loss of employment and the balance of convenience favoured policies addressing health and safety objectives in the context of a pandemic. Notably, in *Lavergne-Poitras*, the applicant was a third-party supplier seeking injunctive relief from the federal government's mandatory vaccination policy requiring third parties to be vaccinated in order to enter federal workplaces. The Federal Court found that the applicant had failed to demonstrate that the government of Canada did not have the authority to impose such a policy and indicated that it could be characterized as a contractual matter that could be imposed on tenders in future contracts.[15]

Overall, the enforceability of a policy is highly contextual and determined on a case-by-case basis. Recognition of the fluidity of our understanding of COVID-19 and the nature of the workplace are prominent factors in assessing enforceability and reasonableness. The successful enforcement of a mandatory vaccination policy often hinges on the inclusion of reasonable alternatives to vaccination where appropriate (such as testing), the policy's alignment with the collective agreement, the need for in-person interactions given the nature of the business, and the risk of infection and vulnerability of workers and/or patrons. The following three Ontario arbitral decisions have analyzed the merits of workplace vaccination policies: *UFCW, Local 333 v. Paragon Protection Ltd. (Paragon)*,[16] *Electrical Safety Authority v. Power Workers' Union (Electrical Safety Authority)*,[17] and *Ontario Power Generation v. Power Workers' Union (Ontario Power Generation)*.[18]

UFCW, Local 333 v. Paragon Protection Ltd.

In *Paragon*, a security services company (Paragon) required all employees to be fully vaccinated by October 31, 2021. Failure to comply included discipline up to and including termination. The impetus behind Paragon's vaccination policy was both the health and safety of workers and the fact that employees attending client sites were required to be vaccinated according to the clients' own vaccination policies.[19]

Arbitrator von Veh held Paragon's policy to be enforceable, finding it was reasonable, struck a balance between workplace safety and respecting employees' rights, and was compliant with the Ontario *Human*

7. See for example the Ontario Human Rights Commission, "OHRC Policy statement on COVID-19 vaccine mandates and proof of vaccine certificates," September 22, 2021, available online at: https://www.ohrc.on.ca/en/news_centre/ohrc-policy-statement-covid-19-vaccine-mandates-and-proof-vaccine-certificates; British Columbia Office of the Human Rights Commissioner, "A human rights approach to proof of vaccination during the COVID-19 pandemic," July 2021, updated October 14, 2021, available online at: https://bchumanrights.ca/wp-content/uploads/COVID-19-vaccine-guidance-Oct.-2021-update.pdf; Alberta Human Rights Commission, "Vaccine mandates and proof of vaccination," revised October 8, 2021, available online at albertahumanrights.ab.ca/covid/Pages/vaccines.aspx.
8. This is current as of December 31, 2021.
9. 2021 ONSC 7081.
10. 2021 ONSC 7139.
11. 2021 ONSC 7658.
12. 2021 FC 1232.
13. 2021 FC 1341.
14. 2021 CarswellNat 6742.
15. 2021 FC 1232, at para 5.
16. *UFCW, Local 333 v. Paragon Protection Ltd (COVID-19 Vaccination Policy), Re*, 2021 CarswellOnt 16048, 150 C.L.A.S. 190 (Ont. Arb.) (*Paragon*).
17. *Electrical Safety Authority v. Power Workers' Union (ESA-P-24), Re*, 2021 CarswellOnt 18219 (Ont. Arb.) (*Electrical Safety Authority*).
18. `November 8, 2021, unreported (*Ontario Power Generation*).
19. *Paragon,* at para 49.

Rights Code and the *Occupational Health and Safety Act (OHSA)*.[20] In particular, the policy was an exercise of the employer's obligation to take "every precaution reasonable in the circumstances for the protection of a worker" under s. 25(2)(h) of the *OHSA*.[21] Arbitrator von Veh referred to the Ontario Human Rights Commission in finding that the choice to not be vaccinated is a personal preference that is not protected by the Ontario *Human Rights Code*.[22]

The union claimed the policy was an unreasonable unilateral policy change that failed to meet the principles set out in *Lumber & Sawmill Workers; Union, Local 2537 v. KVP Co.*,[23] which govern unilateral policy changes. However, Arbitrator von Veh held the policy was implemented with notice, clearly communicated, reasonable in the circumstances, and consistent with the collective agreement.[24] Notably, the collective agreement included a provision that required all employees to receive vaccinations or inoculations. This provision was agreed to five years prior to the COVID-19 pandemic and Arbitrator von Veh found it to be applicable to the issue in dispute and correctly incorporated into Paragon's COVID-19 vaccination policy.[25]

Lastly, Arbitrator von Veh held that COVID-19 is distinct from influenza and therefore previous pre-COVID-19 case law finding mandatory flu vaccination and masking policies unreasonable was distinguishable.[26]

Electrical Safety Authority v. Power Workers' Union

In *Electrical Safety Authority*, a decision released on November 11, 2021, Arbitrator Stout held that the employer's vaccination policy was unreasonable.[27] The policy provided that a failure to comply could result in termination or unpaid leave. The fact that the employer had previously offered testing as an alternative to vaccination and the absence of a change in circumstance to warrant withdrawal of this alternative, factored heavily into Arbitrator Stout's decision.[28] The fact that the employer had faced third-party pressure to mandate vaccination and had the desire, rather than need, for employees to return to the office, was held not to be a significant change warranting a change in policy.[29] In turn, the nature of the business being one where employees can effectively work from home indicated that less intrusive measures than mandatory vaccination were possible and undermined the reasonableness of the policy.[30] Arbitrator Stout cautioned that his decision ought _not_ to be taken as a vindication for those choosing not to get vaccinated without legal exemption.[31]

In contrast to *Paragon*, in *Electrical Safety Authority*, Arbitrator Stout emphasized that there was nothing in the collective agreement that specifically addressed vaccinations.[32] This juxtaposition between the two cases highlights the importance of imbuing the right to mandate vaccinations or disclosure of vaccination status into management rights under the collective agreement. While third-party pressure was deemed one of the reasonable justifications for the vaccination policy in *Paragon*, in *Electrical Safety Authority* it was not, as testing was an alternative provided under the third-party policies and therefore did not justify the employer's removal of testing as an alternative.[33] Arbitrator Stout distinguished Paragon by highlighting that it arose in a different context (security services provided on third-party sites) and involved different collective agreement language.[34]

Ontario Power Generation v. Power Workers' Union

On November 12, 2021, Arbitrator Murray released his decision finding the employer's proposed vaccination policy to be enforceable in the case of *Ontario Power Generation*. The policy required unvaccinated employees to complete a self-administered rapid antigen test on a regular basis. The employer was held to be responsible for the cost of testing.[35] The employees were responsible for taking the test on their own time and were not entitled to compensation for the time it took to administer and report their test result.[36] Arbitrator Murray upheld the proposed consequences for non-compliance, which included unpaid leave for six weeks and termination upon the end of the six weeks. The six-week leave period bolstered the reasonableness of the policy as it provided employees with time to consider their options, especially within the context of the global pandemic. Arbitrator Murray held that termination of employees who failed to comply after the six-week period was a reasonable consequence in the face of their refusal to undergo testing and choice to put co-workers at risk,[37] further indicating that their termination would likely be upheld at arbitration.

Arbitral Decisions in Early 2022

Arbitrators have continued to consistently reinforce the importance of an employer's vaccination policy being consistent with the collective agreement and adhering

20. *Paragon* at para 51.
21. *Paragon* at para 58.
22. *Paragon* at para 59.
23. *Lumber & Sawmill Workers; Union, Local 2537 v. KVP Co.* (1965), 16 LAC 73, 1965 CarswellOnt 618 (Ont. Arb.).
24. *Paragon*, at paras 66-67.
25. *Paragon* at para 64.
26. *Paragon* at para 70.
27. *Electrical Safety Authority* at para 5.
28. *Electrical Safety Authority* at para 24.
29. *Electrical Safety Authority* at para 28.
30. *Electrical Safety Authority* at para 18.
31. *Electrical Safety Authority* at para 4.
32. *Electrical Safety Authority* at para 8.
33. *Electrical Safety Authority* at para 28.
34. *Electrical Safety Authority* at para 40.
35. *Ontario Power Generation* at page 4.
36. *Ontario Power Generation* at page 4.
37. *Ontario Power Generation* at page 7.

to the general principles espoused by the Court in *KVP* regarding unilateral policy changes.[38] For example, in a case where a consequence of non-compliance with the vaccination policy included automatic termination and the collective agreement required just cause, this element of the policy was deemed unenforceable.[39]

Arbitrators have also continued to emphasize the importance of the nature of the workplace and business.[40] A mandatory vaccination policy is more likely to be justified where employees work in close proximity to one another[41] or where a third-party policy requires the business to implement a mandatory vaccination policy.[42] The workplace context can also require considerations of appropriate exceptions to the vaccination policy. For instance, where some employees work exclusively from home or outdoors, an exception to the mandatory vaccination requirement has been required.[43]

Conclusion

The decisions in *Paragon, Electrical Safety Authority, and Ontario Power Generation* indicate that the enforceability of a vaccination policy will depend on contextual factors including the language of the collective agreement, the inclusion of reasonable alternatives, the nature of the business, and the use of reasonable and progressive discipline — and the arbitral decisions released in early 2022 continue to reinforce these principles.

It is likely that there will be many more decisions regarding the enforceability of vaccination policies from arbitrators, tribunals and courts in the coming months. Employers in the mining industry should take these decisions into consideration when developing and implementing a vaccination policy.

38. *Teamsters Local Union 8467 v. Maple Leaf Sports and Entertainment*, 2022 CanLII 544 at para 19 (ON LA) *(Maple Leaf); Chartwell Housing Reit (The Westmount, the Wynfield, the Woodhaven and the Waterford) v. Healthcare, Office and Professional Employees Union*, 2022 CanLII 6832 at paras 191, 195, 205, and 239 (ON LA) *(Chartwell); Bunge Hamilton Canada, Hamilton, Ontario v. United Food and Commercial Workers Canada, Local 175*, 2022 CanLII 43 at paras 14 and 20 (ON LA) *(Bunge); Power Workers' Union v. Elexicon Energy Inc.*, 2022 CanLII 7228 at para 96 (ON LA) *(Elexicon Energy)*.
39. *Chartwell* at paras 191, 195, 205, 239, and 243.
40. *Maple Leaf* at paras 3, 4, and 19.
41. *Maple Leaf* at paras 3 and 19.
42. *Bunge* at paras 16-22.
43. *Elexicon Energy* at para 114.

Case Law Summaries

Securities and Shareholder Disputes

Lindsay Burgess and Heather Mallabone

Smith v. Fancamp Exploration Ltd., 2021 BCSC 1758

In this decision, the Supreme Court of British Columbia dismissed a petition by a director, Dr. Smith (the Petitioner) seeking various forms of relief in respect of the annual general meeting of the publicly traded respondent company, Fancamp Exploration Ltd. (the Company), in the course of an ongoing proxy battle.

The Petitioner was the co-founder of the Company and acted as its president, chairman, and CEO for much of the time between 1986 and 2020. The Company holds interests in numerous mineral resource properties in Canada, as well as shares and warrants in other publicly traded mining companies. The other directors of the Company (Controlling Board Members) were critical of the Petitioner's management during his tenure as CEO and president. In August 2020, the Petitioner resigned as CEO and president (but remained as a director) after being told by the Board that he would be removed.

The Petitioner started the proxy fight by writing to the Board in October 2020, demanding that the Board schedule an AGM, advising that he intended to remove certain directors from the Board, and applying to the B.C. Securities Commission and the TSX-V to request oversight and orders compelling certain acts by the Board. In November 2020, ScoZinc Mining Ltd. (ScoZinc) made an offer to merge with the Company. The Controlling Board Members were of the view that the merger would be advantageous and approved the arrangement in February 2021. The TSX-V provided conditional approval but required that the Company hold its AGM at least two business days before closing the deal and in any event no later than December 31, 2021. In preparation for the AGM, the Controlling Board Members allowed voting to proceed through a technology platform called "Broadridge Quickvote" and, before Dr. Smith declared his dissident slate for the Board, had collected

approximately 1% of total votes through Quickvote for the Controlling Board Members' slate of directors. Upon Dr. Smith announcing his dissident slate, the Quickvote portal was immediately shut down.

The Petitioner sought a number of orders, all of which were refused. The Petitioner first sought an order requiring the AGM to be held approximately four months sooner than planned. The Court declined to order that relief, finding that there was little or no prejudice to either party by delaying the AGM by a few months. The Petitioner also sought the appointment of an independent chair for the AGM. The Court refused that relief as well, because there was no evidence before the Court of an act or omission which created a reasonable apprehension that the AGM would not be conducted properly. The Petitioner sought an order declaring any proxy votes collected by Quickvote to be invalid, which was also refused, because voters had the ability to change their votes up to a date very close to the AGM and in practical terms there was no difference between the Quickvote votes and votes collected by other means. The Court was also concerned that an order invalidating all the Quickvote votes may result in a *de facto* disenfranchisement as some votes may not be recast. Finally, the Petitioner sought an order that the Company not close or complete the merger with ScoZinc until after the court and regulators had resolved any applications arising from the conduct of the AGM. The Court dismissed the application for this relief, finding that it was in substance an application for an injunction and the Petitioner had not established that there was a serious issue to be tried. Further, the Petitioner, as an individual shareholder, had no standing to enjoin the Company from approving the merger, which would require a derivative action.

AM Gold Inc. v. Kaizen Discovery Inc., 2021 BCSC 515

In this decision, the Supreme Court of British Columbia dismissed AM Gold Inc.'s (AM Gold) claims in breach of contract, misrepresentation and trespass. Broadly distilled, the claims related to allegations that Kaizen Discovery Inc. (Kaizen) had breached statutory and contractual disclosure obligations, had omitted to make disclosure in a way that amounted to tortious misrepresentations, and had committed the tort of trespass in the context of an acquisition agreement between them.

AM Gold is a junior mining company whose flagship asset was a gold and copper exploration project in Peru known as Pinaya, which it owned through its subsidiary, Canper Exploraciones S.A.C. (Canper). In the fall of 2014, AM Gold was short on cash and embroiled in a dispute with its joint venture partner over Pinaya. AM Gold subsequently entered into an agreement with Kaizen, another junior mining company, pursuant to which Kaizen acquired Canper from AM Gold and its 100% interest in Pinaya in exchange for C$500,000 cash and 15,384,615 shares in Kaizen. At the time that the transaction closed, Kaizen's share price had dropped from C$0.24 a share to C$0.15 a share.

AM Gold's main set of claims related to an alleged failure by Kaizen to disclose information about its own projects. The claims were advanced as: (i) an alleged breach of a public record warranty in the agreement, which stated that all material information and documents required to be filed with regulators had been disclosed and did not contain misrepresentations; (ii) an alleged breach of a material adverse effect clause in the agreement, which provided that the sale was subject to the condition that a "Kaizen Material Adverse Effect" had not occurred; and (iii) in fraudulent or negligent misrepresentation.

The Court started its analysis by surveying the disclosure requirements under the *Securities Act*, R.S.B.C. 1996, c. 418 (Act), including the requirement to disclose material facts periodically and material changes continuously. The definitions under the Act for both material facts and material changes require that the fact or change be one "that would reasonably be expected to have a significant effect on the market price or value of the security." The Court then distinguished these statutory concepts from the contractual concept of a material adverse effect, the test for which is whether there is a substantial likelihood that the undisclosed information would have affected the deliberations of a reasonable purchaser in the same circumstances. What is material depends on the particular circumstances of the contract and the parties involved, and it must be of some longer-term significance to the purchaser. Finally, the Court reviewed the test for negligent and fraudulent misrepresentation as set out in *Queen v. Cognos Inc.*[1] and *Wang v. Shao*,[2] respectively.

Ultimately, the Court dismissed all of the claims. With respect to alleged non-disclosure, the Court held that there had not been a breach of the public record warranty in the agreement. Although Kaizen had not disclosed certain matters, none were required to be disclosed by the Act. The Court similarly held that there had not been a breach of the material adverse effect clause in the agreement, as the matters complained of did not constitute material adverse effects. Nor did any of the matters complained about satisfy the requirements for the torts of fraudulent or negligent misrepresentation. AM Gold had all the information it was entitled to in order to decide whether or not to proceed with the transaction.

In addition to the above, AM Gold alleged that Kaizen breached its non-disclosure agreement and committed the tort of trespass when it took soil and water samples from the Pinaya property in order to test for contamination. These claims were also dismissed in their entirety.

This decision was subsequently upheld on appeal: see 2022 BCCA 21.

1. 1993 CanLII 146 (SCC), [1993] 1 SCR 87.
2. 2019 BCCA 130.

Re Kilimanjaro Capital Ltd., 2021 ABASC 14 and 2021 ABASC 131

In these decisions, the Alberta Securities Commission (the Commission) found that a mining company and several individuals had engaged in market manipulation contrary to s. 93(a) of the Alberta *Securities Act*.

Kilimanjaro Capital Ltd. (Kilimanjaro, previously Avatar Solutions Inc.) was incorporated in Belize in 2011. A company by the same name was incorporated in Alberta in 2010 (Kilimanjaro Canada). Zulfikar Rashid (Rashid), a resident of Calgary, was the director, CEO, and control person of Kilimanjaro, as well as director, CEO, and shareholder of Kilimanjaro Canada.

In the fall of 2012, Ashmit Patel (Patel) approached Rashid about a project involving future contingent oil, gas and mineral rights in Africa. A decision was made to pursue the project through Kilimanjaro Canada; Rashid would raise funds and then Patel would arrange for the company to be taken public. Kilimanjaro Canada started announcing transactions in news releases and fundraising began. Instead of listing Kilimanjaro Canada's shares, the strategy changed. Kilimanjaro acquired Kilimanjaro Canada, and Kilimanjaro's shares were listed on GXG Markets (GXG), a Danish-regulated exchange, and on OTC markets. Because of Kilimanjaro's connections to Alberta, it was deemed a reporting issuer in Alberta pursuant to Multilateral Instrument 51-105.

Between March and August 2014, various stock promoters disseminated promotional touts for Kilimanjaro. During the same period, Kilimanjaro issued a series of favourable news releases in relation to the contingent rights it already owned and announced new letters of intent and agreements to acquire interests in resource assets, none of which ever vested with Kilimanjaro or Kilimanjaro Canada. Patel concurrently made significant trades of Kilimanjaro shares through a U.S.-based brokerage account and other accounts under his control.

In 2017, the Commission issued a Notice of Hearing against Kilimanjaro, Patel, Rashid, and others, alleging that they had engaged in a market manipulation scheme. Market manipulation under the *Securities Act* occurs when an individual's actions result in or contribute to a false or misleading appearance of trading activity or an artificial price for a security, which the individual knew or ought to have known about. Market manipulation also requires a causal connection between the impugned activity and the potential for the activity to result in a misleading appearance of trading activity or artificial price.

The Commission found, among other things, that Patel breached ss. 93(a)(i) and (ii) of the *Securities Act*, because he knew his actions — disseminating news releases intended to stimulate Kilimanjaro share prices while liquidating Kilimanjaro shares — would result in a misleading appearance of trading activity and artificially increase the price of Kilimanjaro shares. Kilimanjaro was also found to have breached s. 93(a)(ii), as much of Patel's conduct had been on Kilimanjaro's behalf as its controlling mind.

The Commission similarly found that, among other things, Rashid had breached s. 93(a)(ii) of the *Securities Act*, as he either knew or ought to have known about Patel's plans to artificially increase the price of Kilimanjaro shares. While unclear whether Rashid knew that Patel's objective was to manipulate Kilimanjaro's share price, the Commission found that he ought to have known. For instance, documents he received during his time as president and CEO of Kilimanjaro were "littered with signs of a market manipulation scheme." The Commission also noted that Rashid could not disavow the responsibilities that came with the offices of president and CEO of Kilimanjaro.

The Commission dismissed or settled claims against all other respondents.

The Commission released its sanction decision several months later (2021 ABASC 131). Among other things, the Commission ordered Rashid and Patel to pay significant penalties and costs and to resign all positions they held as a director or officer of any issuer or registrant. The Commission also ceased all trading in and purchasing of Kilimanjaro securities or derivatives, and prohibited Kilimanjaro from trading in or purchasing securities. Rashid has filed a notice of appeal of this sanction decision.

Case Law Summaries

Surface Rights and Access to Minerals

Lindsay Burgess

Quercus Algoma Corporation et al. v. Algoma Central Corporation, 2021 ONSC 2457

In this decision, the Ontario Superior Court held that an option to acquire mining rights and associated profits was a right exercisable under s. 14 of Ontario's *Perpetuities Act* and therefore subject to a 40-year vesting period.

In 1997, Algoma Central Corporation (Algoma) sold parcels of timberlands known as the Quercus Algoma Parcels to McDonald Investment Company (McDonald). At the direction of McDonald, Algoma conveyed a number of properties to 3011650 Nova Scotia Limited (301). As part of the transaction, McDonald entered into a mining rights option agreement (Agreement) with Algoma, pursuant to which Algoma had the option to purchase an undivided one-half interest in mining rights with associated profits (Option). The term of the Agreement was 40 years from the date of the transaction and was registered on title. Subsequently, the parcels were divided and conveyed to the applicants who sought a declaration that the Option was void on the basis it was captured by s. 13(3) of the Ontario *Perpetuities Act*, which provides for a 21-year vesting period, and therefore had expired. Section 13(3) applies to "all other options to acquire … any interest in land." Algoma, which had not yet exercised the Option, argued that the Option was subject to the 40-year vesting period under s. 14, which applies "[i]n the case of an easement, profit à prendre or other similar interest to which the rule against perpetuities may be applicable."

First, the Court distinguished between corporeal and incorporeal hereditaments, the former being an interest in land that is capable of being held in possession, such as a fee simple, and the latter an interest in land that is non-possessory, such as easements, profits à prendre, and rent charges. The Court held that the Option in this case was an incorporeal hereditament specifically an option to purchase what in essence was a share in a profit à prendre. Next the Court considered the history of the *Perpetuities Act*, noting its object was to modify the common law rule against perpetuities, and to reflect the modern reality of commercial transactions by creating a longer vesting period for the exercise of future rights over incorporeal property interests.

The fact that the contingent incorporeal interest in the Agreement is framed within a commercial contract as an "option" did not transform it into an interest in a corporeal hereditament. It was reasonable to infer from the terms of the Agreement that the intent of the parties was that the Option was intended to be an "exercisable right in the servient land within the 40-year period," consistent with s. 14. Accordingly, the Court found that the applicable vesting period was 40 years and the Option was presumptively valid.

Primrose Drilling Ventures Ltd. v. Registrar of Titles, 2021 SKCA 15

As we reported in *Mining in the Courts*, Vol. IX, the Registrar of Titles had applied to the Court of Queen's Bench for Saskatchewan by way of reference under Saskatchewan's *Land Titles Act* in order to determine ownership in a dispute over a one-quarter interest in the minerals associated with a piece of land. In this decision, the Saskatchewan Court of Appeal allowed the appeal of Primrose Drilling Ventures Ltd. (Primrose) and determined that it was the owner of the disputed interest.

Great West Life Assurance Company (GWL), owned a plot of land, including its minerals. In 1947, GWL transferred surface title, but expressly reserved its mineral interest. A mistake on the subsequent certificate of title indicated that GWL's mineral interest passed with the surface title. After the transfer of title, the mineral interest was divided into quarters and passed to a number of individuals and corporations, including Unocal Canada Limited in 1971. The Registrar, after discovering the mistake, filed a caveat in 1973 that the mineral interest belonging to GWL was mistakenly transferred, and that any subsequent transfer would be subject to GWL's mineral claim. Primrose was the most recent transferee of the disputed interest, having acquired title in 2006, and it disputed the validity of the caveat. The lower Court found that Primrose was not a *bona fide* purchaser for value, that GWL was wrongly deprived of its title to the minerals because of the Registry's mistake, and that GWL's ownership of the minerals was protected by the caveat. Primrose appealed.

The Court of Appeal allowed Primrose's appeal, finding, among other things, that although an acquirer of mineral or surface title takes subject to the notice provided in a duly registered, pre-existing registrar's caveat registered under the former *Land Titles Act*, the caveat filed in this case was not duly registered.

Under s. 153 of the 1965 *Land Title Act*, the Registrar could file a caveat *"to prohibit the dealing with land in respect of which it appears to him that an error has been made in the certificate of title or any other instrument."* Applying a purposive interpretation of this provision, the Court opined that the purpose of the Registrar's caveat was to provide notice of claims that could, if substantiated, affect the title or registered interest affected by that caveat. Such an interpretation accords with the purposes of indefeasibility, reliance on the register, and transactional efficiency. Here, GWL's claim could not affect Unocal's title as Unocal was a *bona fide* purchaser for value. As the caveat was filed after a *bona fide* purchaser for value acquired the rights, it was not duly registered. Primrose was the owner of the disputed interest and the Court held that caveat must be discharged.

Case Law Summaries

Tax

Caroline-Ariane Bernier, Lindsay Burgess, Alexis Hudon, Charles-Étienne Presse, and Janie L.-Roy

Tenacity Gold Mining Company Ltd. v. Newfoundland and Labrador (Finance), 2021 NLSC 43

In this decision, the Supreme Court of Newfoundland and Labrador upheld Notices of Assessment from the Newfoundland and Labrador Department of Finance (Department) that denied deductions for certain expenditures in relation to the calculation of mining taxes and mining royalty taxes because they were pre-production expenditures.

Tenacity Gold Mining Company Ltd. (Tenacity) is a mineral exploration company that owned two mines in Newfoundland, the "Stog'er Tight Property" and the "Deer Cove Property." Tenacity worked on both properties from 2009 to 2011, including detailed geological mapping and sampling, diamond drilling of 77 holes, trenching, pitting, assays, bulking sampling, milling and beneficiation work at the Stog'er Tight Property, and activities in anticipation of milling the ore at the Deer Cove Property. This work resulted in expenses of more than C$3 million before operations were shut down when it was determined the mines were not commercially viable. From 2009 to 2015, Tenacity also received royalty payments from a mine owned and operated by Anaconda Mining Inc. (Anaconda), which payments incurred mineral rights taxes of C$600,000. The dispute in this case was in respect of the mineral rights taxes assessed by the Department for the years 2009 to 2013, as well as mining tax for the years 2012 to 2013, and specifically the

Department's rejection of the classification by Tenacity of certain expenses as exploration expenditures.

Under the provincial *Revenue Administration Act* (Act), both the mining taxes and mineral rights taxes are calculated after deducting "exploration expenditures," which are defined in the Act as "an expenditure relating to prospecting, sampling, mapping, diamond drilling, and other work involved in searching for ore in the province under a licence to explore for minerals issued under the Mineral Act ..." Conversely, the Act defines "pre-production expenditure" as "costs, other than capital costs, incurred in order to bring a mine into commercial production, less revenue earned before the mine comes into commercial production."

The key issue in the case was whether Tenacity's "bulk sampling" expenses were exploration expenses. The Court held that "bulk sampling" is the extraction of a large amount of material taken from an area of the mine site that represents the mineral deposit, usually done at the later stages of exploration or during pre-production development to *determine the feasibility* of a mineral deposit. While the Court accepted that Tenacity had extracted nearly 30,000 tonnes of ore from the Stog'er Tight Property prior to determining the mine was not commercially viable, this extraction could not be considered "bulk sampling" because Tenacity had held mining leases for the properties, had sought approval to mine the entire reserves — but did not apply for approval to extract a bulk sample — had entered into multiple gold purchase agreements in 2010, and had described the work planned for 2010 as "mining" in communications to the Department of Natural Resources and subsequent reports. The Court agreed with the Department's conclusions in finding Tenacity had not incurred exploration expenses because: (i) Tenacity was mining ore on these properties, not exploring for it; (ii) Tenacity did not incur bulk sampling expenses; (iii) even if Tenacity had incurred bulk sampling expenses, it would not be "exploration expenditures" in this context; and (iv) the Act does not allow bulk sampling expenses to be offset against the mineral rights taxes and the mining tax. The Court also noted that exploration expenditures were only permitted if they were incurred while searching for ore in the province under a licence to explore for minerals under the *Mineral Act*. Tenacity had operated under a mining lease, not a licence to explore.

Glencore Canada Corporation v. The Queen, 2021 TCC 63

This was an appeal from a reassessment under the *Income Tax Act* (Act) in which the Minister of National Revenue (Minister) assessed as income a commitment fee and non-completion fee received by Glencore Canada Corporation's predecessor, Falconbridge Limited (Falconbridge), as a result of a failed merger. The Tax Court of Canada held that the fees were ancillary business income received by Falconbridge in the course of earning income from its mining business.

Falconbridge developed a nickel deposit in Sudbury, Ontario and a refinery in Kristiansand, Norway. In 1996 Falconbridge entered into a merger offer with Diamond Fields Resources Inc. (Diamond Fields) in respect of the Voisey's Bay nickel mine. The agreement required that Diamond Fields pay Falconbridge a commitment fee upon execution of the Merger Offer Delivery Agreement and a non-completion fee (together, the Fees) if a certain project didn't succeed. Inco Limited made a subsequent acquisition offer to Diamond Fields, and ultimately, Diamond Fields rejected Falconbridge's offer and accepted Inco's offer. The Fees were paid to Falconbridge.

Falconbridge included the Fees in computing its income on its 1996 income tax return. The Minister initially assessed Falconbridge's income tax return and accepted its reporting treatment of the Fees as income.

Falconbridge objected to the assessment and requested that the assessment be referred back to the Minister. The Minister reassessed Falconbridge without removing the Fees from income. Falconbridge objected to these reassessments and the Minister again reassessed Falconbridge without removing the Fees from income.

At the Tax Court of Canada, the appellants argued that the Fees were not taxable as they were an extraordinary receipt and did not fall under an enumerated source of income in s. 3 of the Act. In dismissing the appeal, the Court relied on *Ikea Limited v. Canada*[1] in which the Supreme Court of Canada held that the determination of the characterization of an extraordinary or unusual receipt involved a number of factors including the commercial purpose of the payment and its relationship to the business operations of the recipient. The Court found that Falconbridge's business consisted of exploring, developing, mining, processing and marketing minerals. The potential acquisition of Diamond Fields was a means to acquiring the ore deposits. Moreover, Falconbridge pursued Diamond Field's ore deposit for the purpose of making a profit and the Fees received by it were inextricably linked to Falconbridge's ordinary business operations as a nickel mining company.

1. 1998 CanLII 848, [1998] 1 SCR 196.

Ressources Eastmain inc. v. Agence du revenu du Québec, 2021 QCCQ 4379

In this decision, the Court of Québec considered the meaning of "all or substantially all" in Québec's *Taxation Act* (Act) and applicable regulations.

Dr. Robinson is the chief geologist and CEO of Ressources Eastmain inc. (Eastmain). Eastmain appealed four assessments from the Québec Revenue Agency (QRA) in which the QRA refused certain expenses, including a portion of Dr. Robinson's compensation, as eligible expenses for the purposes of calculating a resource tax credit on the basis his duties were not "all or substantially all" related to exploration or development activities. Eastmain argued that, while some of Dr. Robinson's time was dedicated to the preparation of public filings, presentations to investors, and other administrative matters, most of his time was dedicated to exploration and development activities such as monitoring exploration, compiling data, and analyzing collected samples.

The Court noted that the term "all or substantially all" is not defined in the Act or the applicable regulations. However, Canadian jurisprudence has held that a determination of "all or substantially all" cannot be determined by a simple mathematical formula, but rather should be interpreted in light of the applicable factual context. Although the "all or substantially all" test is satisfied when 90% of an expense is related to exploration or development activities, a percentage of 75% can be satisfactory in certain cases.

The Court found that the auditor from QRA took a number of facts for granted in rejecting the portion of Dr. Robinson's compensation claimed as eligible expenses, specifically by basing his conclusion on an analysis of Dr. Robinson's travel expenses, the presence of a large team of geologists and project directors within the company, and the fact that Eastmain only claimed a portion of Dr. Robinson's salary as exploration expenses. The Court preferred the evidence tendered by Eastmain, in particular a report using a cost accounting method to distribute Dr. Robinson's salary according to his activities and tasks that showed he spent approximately 75% of his time on exploration and development activities, which was sufficient in the Court's opinion to satisfy the test imposed by the expression "all or substantially all" in the Act. The Court cancelled the four tax assessments at issue and referred the amount of the resource credit for each year back to the QRA for reassessment.

Article

2021 Brings Important Decisions on Patent Validity in the Oil and Gas Industry

Amber Blair, Tracey Doyle, Timothy St. J. Ellam, Q.C., James S.S. Holtom, Kendra Levasseur, Steven Tanner, and Samantha Wasserman

In 2021, the Federal Courts released three important decisions involving patents related to technology in the mining sector and the oil and gas industry. Patent protection entitles the patent owner to a time-limited monopoly over the patented technology and can represent a highly valuable asset for industry participants. Often, when a patent is asserted, the defendant will argue that the patent is invalid as a defence.

In this article, we provide an overview of these decisions, which dealt with patent validity in the oil and gas sector. Going forward, these cases may inform the scope of patent protection in the mining and oil and gas sectors.

Swist et. al. v. MEG Energy Corp., 2021 FC 10

In this decision, the defendant, MEG Energy Corp. (MEG), successfully argued that the plaintiff Jason Swist's (Swist) patent in respect of pressure assisted oil recovery was invalid and that in any event, MEG did not infringe it.

This case involved "SAGD" — steam-assisted gravity drainage — which is a method for extracting bitumen from oilsands using a "well pair," i.e., two wells that run horizontally underground that are vertically separated from one another. Steam is typically injected into the top well of the pair, forming a steam chamber that reduces viscosity and promotes mobility of the bitumen. The mobilized bitumen then drains into a lower "producer" well, which pumps it to the surface. A so-called "third well" can be placed between two adjacent well pairs to heat and/or collect additional bitumen. Swist's patent claimed a modification to SAGD in which fluid injection into the third well commences at an early stage, prior to communication between adjacent steam chambers from the adjacent well pairs. This generates a "large singular zone of increased mobility." According to the patent, this should result in the more rapid and efficient extraction of oil from the oil reservoir.[1]

In response to claims of patent infringement, MEG Energy Corp (MEG), argued that Swist's patent was invalid on the grounds of anticipation, obviousness, inutility, and overbreadth.[2] The Federal Court held that the claims were invalid because they were anticipated by three separate references, and they claimed for methods that did not work.

Regarding anticipation, MEG argued that the invention claimed in the patent had been previously disclosed to the public before the patent in five separate single references.[3] The Federal Court agreed with MEG that Swist's asserted claims were anticipated by three prior art patents owned by Encana, Amoco Corp (now BP), and the Alberta Oil Sands Technology and Research Authority (AOSTRA). AOSTRA disclosed the same well orientation and operation of the "third well" as claimed in Swist's patent, which was also used to produce oil more quickly and efficiently.[4] Amoco disclosed a "staged procedure" for injection and production that results in the same well orientation and timing of injection as claimed by Swist's patent.[5]

On the final piece of prior art, Encana's wedge-well patent, Swist argued that there was no anticipation because Encana's invention was specific to operating the third well after (not before) communication had already taken place between the adjacent well pairs. The Court accepted the evidence of MEG's experts, who explained that despite that invention, Encana also disclosed the early operation of the third well prior to communication, even though that was not the invention claimed in that patent. The Court held the fact that a piece of prior art "teaches away" from an impugned patent is irrelevant to an anticipation analysis.[6] It agreed with MEG that because the wedge-well patent envisaged early injection into the third well, even if it was not the most preferable way to operate the invention, it still disclosed all of the essential elements of the claims of Swist's patent.

In contrast to the anticipation holding, the Court found that Swist's patent would not have been obvious to ordinarily skilled persons working in the field at the time in light of the prior art and their common general knowledge. Because the Encana patent "taught away" from the patent's invention of early injection, the skilled person would have had no reason to depart from the teachings of Encana regarding late injection into the third well.[7] Absent any motivation by the skilled person to find the solution taught by the patent, Swist's patent was not invalid for obviousness.[8]

Next, the Court addressed the patent's utility, i.e., whether the invention would not work to obtain the benefits claimed in the patent. In assessing utility, the court must identify the subject matter of the invention as claimed and must then ask whether that subject matter is useful, i.e., whether it is capable of a practical purpose.[9] MEG argued that, based on the language of the patent, the subject matter of the invention was *enhancement* of the traditional SAGD method. Adjacent SAGD well pairs were already notorious in the field and adding the effort and expense of a "third well" between SAGD well pairs would only be useful if it enhanced bitumen recovery beyond that which would have been achieved in the absence of the third well. However, computer simulation data commissioned by the inventor showed that, over the operating life of the invention, it provided worse production than traditional SAGD. The Court agreed with MEG that simply producing oil was not enough to satisfy the utility requirement. Because the invention's subject matter was *enhancement* of traditional

1. *Swist v. MEG Energy Corp.*, 2021 FC 10 at para. 5 (*Swist*).
2. The Federal Court held it was unnecessary to consider overbreadth in light of the findings on other grounds.
3. *Swist*, para. 142.
4. *Swist*, paras. 169-173.
5. *Swist*, para. 182.
6. *Swist*, para. 151.
7. *Swist*, para. 214.
8. *Swist*, para. 214.
9. *Swist*, para. 215.

SAGD, and the invention was not capable of providing this, the patent lacked the requisite utility and was also invalid for this reason.

Finally, the Court held that, even if the patent were valid, it would not have been infringed.[10]

Betser-Zilevitch v. Petrochina Canada Ltd., 2021 FC 85

This decision also involved a patent for SAGD technology, the validity of which was ultimately upheld. The patent related to a modularized SAGD well pad[11] for heavy oil production and methods for its installation. "Modularization" involves a method of constructing well pads in which modules for use at the well pad are pre-assembled off-site, and then transported and connected to each other at the eventual site of the well pad. In the patent's claimed system for heavy oil production, both the injection and production flow lines for the SAGD system are situated on the lowest, first level of the modules.[12]

By the conclusion of the trial, the only validity issue remaining was obviousness.

To support its argument that the claimed invention was obvious, the defendant, PetroChina Canada (PetroChina), pointed to the public display and use of SAGD modules from other heavy oil recovery sites in Alberta that were available prior to the claim date of the plaintiff's patent. PetroChina argued that these displays formed part of the "state of the art" to which the patent's inventive concept should be compared. The Court agreed that these prior displays could form part of the state of the art, provided they were in fact available to the public at the relevant time.[13] In this case, the Court found that this information was publicly available because it had been displayed during site visitations and transportation, as well as in various marketing presentations.[14]

In addressing the degree of scrutiny that would be required through such public viewing to make the prior display form part of the state of the art, the Court relied on its previous decision in *Bombardier Recreational Products Inc v. Arctic Cat*, noting that the "[public] disclosure itself must convey enough information for the skilled person to make the invention or … to discover the internal structure and then reproduce the invention without undue burden."[15] Here, visual inspection was sufficient to identify the relevant elements of the modules, including the positions of all of the flow lines. Both expert and fact witnesses were able to discern these elements in reference to photographs during the trial.[16]

Based on the prior public displays of the modules from these other Alberta sites, the Court found that the difference between the state of the art and the inventive concept of the patent was the location of both the injection and production lines on the first, lower level of the modular setup. The Court ultimately held that it would not have been obvious to the skilled person to place the injection line on the same lower level as the production line.[17] The skilled person would have had to balance a number of factors applicable to module design, "including piping sizes, the location of expansion loops, condensate buildup, [and] reservoir capacity," which would not have made it obvious to the skilled person to put both lines on the first level.[18] As well, prior to the impugned patent being made public, no one in the industry had designed a well pad with both lines on the lower level.[19] The plaintiff's patent was thus not obvious and held to be valid.

Although the validity of the patent in this case was upheld, companies involved in patent litigation should bear in mind that prior public displays of a later patented invention could form the basis for an obviousness attack. Preserving confidentiality before a patent is filed covering any new technology is therefore crucial.

Western Oilfield Equipment Rentals Ltd. v. M-I LLC, 2021 FCA 24

In this decision, the Federal Court of Appeal, in affirming the lower court's finding that the impugned patent was valid, clarified the law on obviousness, sufficiency, and addition of new subject matter.

The patent at issue in this decision was for a "shale shaker," a device used to remove solids from the drilling fluid used to lubricate drilling equipment and move unwanted solids to the surface during oil well drilling. Once the shale shaker removes the solids from the drilling fluid, this fluid can be recycled back into the wellbore. The patented shale shaker in this instance had an improved rate and improved efficiency at removing solids.

The Federal Court found that the Defendant M-I L.L.C.'s (M-I) patent was valid and that it had been infringed by the plaintiff, Western Oilfield Equipment Rentals Ltd. (Western Oilfield). Western Oilfield appealed and challenged the lower court's findings on a myriad of grounds of invalidity, including anticipation, obviousness, insufficiency, ambiguity, inutility, overbreadth, and the addition of new subject matter.

The Court of Appeal stressed that parties appealing decisions of a lower court should pay close attention to the standard of review — the degree of appellate scrutiny

10. *Swist*, para. 137..
11. *Betser-Zilevitch v. Petrochina Canada Ltd.*, 2021 FC 85 at para. 7 (*Betser-Zilevitch*).
12. *Betser-Zilevitch*, para. 12.
13. *Betser-Zilevitch*, paras. 160-161.
14 *Betser-Zilevitch* para. 162.
15. *Betser-Zilevitch*, para. 164-165, citing *Bombardier Recreational Products Inc. v. Arctic Cat*, 2017 FC 207, rev'd on other grounds 2018 FCA 172.
16. *Betser-Zilevitch*, para. 165.
17. *Betser-Zilevitch*, para. 171.
18. *Betser-Zilevitch*, para. 171.
19. *Betser-Zilevitch*, para. 171.

— in deciding which issues to pursue on appeal. Patent validity issues often involve questions of fact or mixed fact and law, for which the standard of review is "palpable and overriding error." The Court noted that many of the appellants' arguments asked it to reweigh the evidence and facts from the court below. The Court of Appeal declined to do so, stating "[t]hat is not our role"[20] and noting the "lack of wisdom" in appealing so many issues.[21] This decision is therefore an important reminder for parties to pay close attention to the standard of review and to focus on key issues in deciding what to pursue on appeal.

On the merits, the Court of Appeal affirmed all of the holdings of the court below, noting that it could not identify any errors that warranted intervention, and in doing so, clarified the law on obviousness, sufficiency, and addition of new subject matter.

On obviousness, the appellants argued that the trial judge had failed to properly apply each of the four steps of the applicable legal test from *Apotex Inc. v. Sanofi-Synthelabo Canada Inc.*, 2008 SCC 61 (Apotex). The Court of Appeal acknowledged the lower court had merged the last three elements of the test, but affirmed that the Federal Court had clearly considered all of the arguments raised and had simply preferred some expert evidence over others, which did not amount to a reviewable error.[22] Second, and more interestingly, the Court noted that although the well-known four-step test from *Apotex* is one useful way to assess obviousness, it is not a mandatory undertaking. The only mandatory considerations in respect of obviousness are the requirements laid out in s. 28.3 of the *Patent Act*.[23]

The Court of Appeal also clarified the law on sufficiency of disclosure. The sufficiency requirement in s. 27(3)(c) of the *Patent Act*[24] mandates that a patent describe what the invention is and how it works, such that people working in the field, with only the patent in hand, could have put the invention into practice. In the context of machines, this requires that the patent disclose the "best mode" in which the inventor contemplated the application of the principles of the machine.

Western Oilfield argued that the Federal Court had erred in concluding that the "best mode" requirement did not apply in this case because the patent was for a system, rather than a machine. The Court of Appeal agreed with this argument, noting that "it is not clear that defining an invention as a system rather than a machine" should eliminate the best mode requirement.[25] In this case, the refusal of the court below to enforce the best mode requirement was not important enough to have affected the result.[26] However, companies should bear in mind that a patent for a "system" may not always relieve patentees of their obligation to comply with the best mode requirement.

Finally, the Court of Appeal dealt with arguments about amendments to the patent application. Section 38.2(2) of the *Patent Act* provides that the specification and

drawings may not be amended after filing to add any matter "that cannot reasonably be inferred" from the original specification and drawings. Western Oilfield argued that (i) the patent claims to "controlling air flow" define the purpose as "to prevent stalling of the slurry on the screen" of the shale shaker, but this purpose was not reasonably inferable from the patent application as filed;[27] and (ii) that while the original application only contemplated the use of a pulsing pressure differential, the amended patent found *continuous* pressure to fall within the scope of the claims, which could not reasonably be inferred from the original application.[28]

The Court of Appeal made two important findings on this issue: first, it declined to follow the strict approach taken in the United Kingdom on reasonable inferability, stating that Canadian law does not suggest that a strict test should be applied.[29] Second, it held that the patentee's motivation in amending its patent application is not relevant to the question of whether new matter can be reasonably inferred from the original application.[30] On the facts of the case, the Court of Appeal upheld the lower court's finding that both "controlling air flow" and prevention of the slurry from stalling could both be inferred from the original application.[31]

Conclusion

These decisions illustrate the law with respect to challenging patent validity in the oil and gas sector. Technology patents are valuable assets for participants in the mining and oil and gas industries. As such, industry participants should take note of the patent protection outlined in these cases so that they are best placed to assert their patents and protect their valuable assets.

20. *Western Oilfield Equipment Rentals Ltd. v. M-I LLC*, 2021 FCA 24 at para. 13 (*Western Oilfield*).
21. *Western Oilfield*, para. 9.
22. *Western Oilfield*, para. 108.
23. *Western Oilfield*, para. 109.
24. R.S.C., 1985, c. P-4.
25. *Western Oilfield*, para. 119.
26. *Western Oilfield*, para. 120.
27. *Western Oilfield*, para. 138.
28. *Western Oilfield*, para. 138.
29. *Western Oilfield*, paras. 140-143.
30. *Western Oilfield*, para. 144.
31. *Western Oilfield*, para. 147.

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