RECENT JUDICIAL DECISIONS OF INTEREST TO ENERGY LAWYERS

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This article provides an overview of recent judicial decisions of interest to energy lawyers. The authors review and comment on recent Canadian case law in a number of areas, including: aboriginal, competition, contract, employment and labour, environmental, surface rights, administrative and regulatory, taxation, and builders' liens.

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I. ABORIGINAL

A. *TSILHQOT'IN NATION V. BRITISH COLUMBIA*[1]

1. BACKGROUND

Tsilhqot'in is a significant decision as it marks the first time the Supreme Court of Canada found that an Aboriginal group has satisfied the test for Aboriginal title. The Supreme Court also discussed the specific consultation principles applicable to development on Aboriginal title lands, and expanded the interplay between Aboriginal title and provincial laws of general application.

2. FACTS

The Tsilhquot'in Nation is comprised of six semi-nomadic First Nations who live in and have historically occupied a remote area located in central British Columbia. In 1983, the Xeni Gwet'in band, one of the six bands comprising the Tsilhqot'in Nation, sought a declaration to prohibit commercial logging on traditional Tsilhquot'in Nation land (after the Province granted logging licences to cut trees). In 1998, the action was amended to add a claim for Aboriginal title to approximately 5 percent of what the Tsilhquot'in Nation regard as its traditional territory.[2]

3. DECISION

The Supreme Court surveyed a number of outstanding issues related to Aboriginal title claims in *Tsilhqot'in*. The Supreme Court reaffirmed that the test from *Delgamuukw v. British Columbia*[3] applies to Aboriginal title claims of semi-nomadic First Nation groups in seeking to prove Aboriginal title.[4] More specifically, per *Delgamuukw*, it was held that in

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1 2014 SCC 44, [2014] 2 SCR 257 [*Tsilhqot'in*].
2 *Ibid* at paras 3–6.
3 [1997] 3 SCR 1010 at para 143 [*Delgamuukw*].
4 *Tsilhqot'in*, *supra* note 1 at paras 24, 44. This test applies to non-nomadic Aboriginal groups as well.

order to successfully prove Aboriginal title, the group must demonstrate that the occupation of the Aboriginal people is: (1) sufficient; (2) continuous; and (3) exclusive.[5]

To establish "sufficiency," a culturally sensitive analysis of both Aboriginal (for example, oral stories) and common law perspectives must be undertaken with regard to the First Nations' occupation. Occupation can be sufficient to ground title if a semi-nomadic Aboriginal group regularly used the land, which "use" can include cutting trees or grass, hunting, fishing, trapping, foraging, and perambulation. To establish "continuous" occupation, the Aboriginal group must show that its present occupation was rooted in pre-Canadian sovereignty times. Finally, to satisfy the "exclusivity" requirement, "[t]he Aboriginal group must have had '*the intention and capacity to retain exclusive control*' over the lands."[6]

Aboriginal title was established by the Tsilhqot'in Nation because it could demonstrate ongoing and regular use of the area in question. It is further noted that the establishment of continuously occupied village sites is not necessary to support a claim for Aboriginal title by an Aboriginal group.[7]

The Supreme Court also surveyed the characteristics of Aboriginal title. Aboriginal title is *sui generis*.[8] However, it has similarities to other interests in land: "Aboriginal title confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land."[9] Notwithstanding the foregoing similarities to fee simple title, because Aboriginal title confers ownership rights to a collective to be held for future generations, Aboriginal title lands cannot be alienated in such a way that prevents future generations from utilizing the lands. However, Aboriginal title lands may be utilized for modern economic purposes.[10]

For the government to properly infringe on Aboriginal title, the Supreme Court specified that the government must show that: (1) it discharged its duty to consult and accommodate; (2) there was a compelling and substantial public purpose; and (3) the infringement is justified under section 35 of the *Constitution Act, 1982*[11] and is consistent with the government's fiduciary obligations.[12] Significantly, the Supreme Court confirmed that the Crown must discharge its duty to consult on lands where Aboriginal title is claimed, but not yet proven.[13]

Finally, the Supreme Court reviewed the interplay between Aboriginal title and provincial laws of general application. Generally, provincial laws will apply to lands subject to

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5 *Ibid* at para 25.
6 *Ibid* at para 47 [emphasis in original], citing *Delgamuukw*, *supra* note 3 at para 156.
7 *Tsilhqot'in*, *ibid* at para 54.
8 A Latin phrase meaning "of its own kind or genus" — hence, unique in its characteristics.
9 *Tsilhqot'in*, *supra* note 1 at para 73.
10 *Ibid* at para 74.
11 *The Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
12 *Tsilquot'in*, *supra* note 1 at para 77.
13 *Ibid* at para 93.

Aboriginal title; however, such provincial laws may be subject to constitutional limitations.[14] Compelling and substantial objectives, consistent with the Crown's fiduciary duty to the First Nation, must support any provincial laws that infringe on Aboriginal title.

4. COMMENTARY

Lengthy Aboriginal title claims will likely continue to affect and add uncertainty to resource development, especially in British Columbia where treaties have not extinguished Aboriginal land claims. Although the Crown's duty to consult with First Nations, who have asserted but not proven Aboriginal title claims appears to be unchanged, *Tsilhqot'in* is expected to be cited by Aboriginal groups with outstanding title claims in the course of proceedings relating to the development of resource and infrastructure projects as support for deeper consultation requirements before such projects can proceed. The Crown and industry would be well advised to be cognizant of the rights that may be asserted by Aboriginal groups with strong prima facie Aboriginal title claims, especially in areas where development may be opposed. Project proponents may now need to consider whether it is preferable to pursue developments where Aboriginal rights have already been confirmed, as some of the uncertainty created by the *Tsilhqot'in* decision may be mitigated as project proponents will have a clearer understanding of their obligations to affected First Nation groups in respect of such developments.

B. *FORT MCKAY FIRST NATION V. ALBERTA (MINISTER OF ENVIRONMENT AND SUSTAINABLE RESOURCE DEVELOPMENT)*[15]

1. BACKGROUND

This case discusses the extent of the duty to consult with Aboriginal groups in relation to resource development projects.

2. FACTS

Alberta's Environment and Sustainable Resource Development Ministry is responsible for dispositions of land under the *Public Lands Act*;[16] including Crown consultations with Aboriginal groups. The Ministry is in charge of its own process, including the scope of consultation.[17]

In 2012, Koch Oil Sands Operating ULC (Koch) applied for surface dispositions for drilling and seismic exploration programs within and near Fort McKay First Nation (FMFN) reserve lands. Due to the location of the development, Koch notified FMFN of its exploration plans.[18] Originally, the Ministry stated that the consultation process only required notification with limited follow-up, but the consultation actually resulted in a more extensive consultation process by the Ministry and the project proponents. Koch proceeded with the initial

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14 *Ibid* at para 101.
15 2014 ABQB 393, [2014] 8 WWR 703 [*Fort McKay*].
16 RSA 2000, c P-40.
17 *Fort McKay, supra* note 15 at para 11.
18 *Ibid* at paras 13–14.

discussions with FMFN and the Ministry until Prosper Petroleum Ltd. (Prosper) acquired Koch's mineral leasehold interests in October 2012.[19] The Ministry deemed the consultation to be adequate and issued land activity dispositions for the project. The FMFN then sought judicial review and an order quashing the Ministry's decision.

The Alberta Court of Queen's Bench detailed the numerous communications and negotiations that had occurred amongst the parties, including discussions on environmental and wildlife mitigation strategies from August 2012 until the Ministry issued a Letter of Authorization in July 2013.[20] However, even with the extensive consultations, there was an outstanding issue regarding the extent of a buffer zone surrounding the proposed development that the parties had not yet agreed upon.

3. DECISION

In its decision, the Court of Queen's Bench examined a number of issues regarding the Crown's duty to consult with Aboriginal groups in relation to proposed natural resource projects. It held that the Ministry's treatment of the duty to consult was appropriate.[21] Falling within the spectrum of consultation set out in *Haida Nation v. British Columbia (Minister of Forests)*,[22] the consultation process was neither a general discussion of issues, as is required when an Aboriginal claim or right is limited, nor was the process comprised of submissions and formal participation in the decision-making process, as is required when an Aboriginal claim is prima facie strong and the potential infringement would likely be of high significance to Aboriginal groups.[23]

The Court of Queen's Bench then considered whether the duty had been properly discharged and concluded that the engagement process followed by the Ministry was satisfactory. As well, the Court of Queen's Bench found that any delay in the consultation process appeared to have been due to inaction by the FMFN, the FMFN never raised concerns that Prosper or the Ministry were not meeting consultation requirements, and that Aboriginal groups shoulder responsibility during the engagement process:

> As prior decisions have noted, First Nations continue to bear responsibility to carry their end of the consultation by: making their concerns known, responding to the government's attempt to meet their concerns and suggestions, and trying to reach some mutually satisfactory solution.
>
> First Nations are entitled to support in assessing proposals and to pose concerns. However, they do not have a veto, and are not entitled to frustrate the Crown's reasonable good faith attempts, nor to take unreasonable positions to thwart decisions where agreement has not been reached despite meaningful consultation.[24]

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19 *Ibid* at para 25.
20 *Ibid* at paras 19–79.
21 *Ibid* at para 100.
22 2004 SCC 73, [2004] 3 SCR 511 at para 43 [*Haida*].
23 *Fort McKay*, *supra* note 15 at para 94.
24 *Ibid* at paras 105–106 [citations omitted].

The Court of Queen's Bench also found it was proper for the Ministry to delegate some of its consultation duties to Prosper because Prosper was in the best position to consider the mitigation measures in response to the FMFN's concerns.

As to the substance of the consultation, the Court of Queen's Bench found that the only outstanding issue was the scope of the buffer zone.[25] The evidence showed that, despite this issue being outstanding, the Ministry had agreed to consider a comprehensive solution regarding the buffer zone. By agreeing to consider a more comprehensive solution, the Court of Queen's Bench held that the Ministry "did not forfeit or otherwise paralyze its responsibility to complete a timely assessment of the adequacy of actual consultation and mitigation of impacts arising from the proposed Prosper Project."[26]

The Court of Queen's Bench commented that Prosper should have included the FMFN in all communications, including correspondence with the Ministry. However, although Prosper did not adequately satisfy this requirement, the lack of communication did not defeat the Ministry's approval of the project; rather, the Ministry had provided adequate reasons for its decision and had followed an appropriate process which resulted in communicating the basis of approval to the FMFN.[27]

4. COMMENTARY

This case highlights how all parties must be fully engaged in the consultation process in order to come to a fair and equitable solution, but not all parties must agree to the final solution. The process includes the affected Aboriginal groups being responsive to the consultation efforts being made by the Crown and the project proponents.

As well, although not determinative in this case, a failure to adequately communicate with Aboriginal groups by a project proponent could be grounds for a court to determine that the consultation was inadequate.

C. *COUNCIL OF THE INNU OF EKUANITSHIT V. CANADA (ATTORNEY GENERAL)*[28]

1. BACKGROUND

This case addresses the Crown's duty to consult in relation to an environmental assessment for two hydroelectric plants.

2. FACTS

The *Innu of Ekuanitshit* decision concerned the development of two hydroelectric plants on the Lower Churchill River in Labrador (the Project).[29] At the time the action was

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25 *Ibid* at para 108.
26 *Ibid* at para 114.
27 *Ibid* at paras 146–48.
28 2014 FCA 189, 376 DLR (4th) 348 [*Innu of Ekuanitshit*].
29 *Ibid* at para 8.

commenced, only one of the hydroelectric plants had a scheduled construction date.[30] The Project required a federal environmental assessment under the 1992 *Canadian Environmental Assessment Act*[31] as well as an environmental impact study under similar provincial legislation.[32] A Joint Review Panel was subsequently established to conduct the environmental assessment.[33]

As part of its review, the Joint Review Panel collected submissions from various stakeholders and Aboriginal groups, including the Innu of Ekuanitshit.[34] The Joint Review Panel also held public hearings at which the Innu of Ekuanitshit participated.[35] In its final report on the environmental assessment, the Joint Review Panel found that the significant adverse environmental and socio-economic effects that would be caused by the Project would be outweighed by the significant economic benefits that it would generate.[36] The Joint Review Panel also included a list of mandatory mitigation measures concerning "birds, fish, mammals and their habitat; Aboriginal use of land and resources for traditional purposes; socioeconomic effects; and physical and cultural heritage."[37] The Federal Government, and the responsible federal authorities, subsequently determined that the Project was justified (the Response), and the Governor-in-Council endorsed the Response by Order in Council (the Order).[38] The responsible authorities went on to file their decision (the Approvals) with the Canadian Environmental Assessment Agency.[39]

The Innu of Ekuanitshit brought an application seeking judicial review of the Approvals.[40] The Federal Court dismissed the application.[41] The Innu of Ekuanitshit appealed this decision on the basis that the Approvals did not comply with the *CEAA 1992*, and that the Crown had breached its duty to consult.

3. DECISION

The Federal Court of Appeal dismissed both grounds of the appeal.

The Federal Court of Appeal rejected the argument that the Governor-in-Council and the responsible federal authorities were not able to determine whether the Project's negative consequences were justified because one of the hydroelectric plants did not have a confirmed construction date, as there was no evidence that this hydroelectric plant had been abandoned, ultimately not to be developed.[42] As a result, the Federal Court of Appeal found that the Federal Court had made no error regarding the reasonableness of the Approvals.[43] However,

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30 *Ibid* at para 57.
31 SC 1992, c 37 [*CEAA 1992*], as repealed by *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19.
32 *Innu of Ekuanitshit*, *supra* note 28 at paras 9–10.
33 *Ibid* at para 16.
34 *Ibid* at para 19.
35 *Ibid* at para 21.
36 *Ibid* at para 22.
37 *Ibid* at para 26.
38 *Ibid* at paras 22, 24.
39 *Ibid* at para 27.
40 *Ibid* at para 1.
41 *Conseil des Innus de Ekuanitshit v Canada (Attorney General) et al*, 2013 FC 418, 431 FTR 219.
42 *Innu of Ekuanitshit, supra* note 28 at paras 46, 54–55, 66, 72.
43 *Ibid* at para 80.

the Federal Court of Appeal did caution that, if one of the hydroelectric plants had been abandoned and it was clear that the development would not proceed, this would have raised serious issues about the validity of the environmental assessment and the Approvals.[44]

The Federal Court of Appeal also rejected the Innu of Ekuanitshit's argument that the government had neglected its duty to consult at this stage of the development process, and the argument that the Federal Court erred in stating that the environmental assessment process under the *CEAA 1992* allowed the Crown to partially meet its constitutional duty to consult.[45] With respect to the duty to consult during an environmental assessment, the Court of Appeal held that "participation in a forum created for other purposes … may nevertheless satisfy the duty to consult if, *in substance*, an appropriate level of consultation is provided."[46] However, the Federal Court of Appeal also found that an invitation to participate in an environmental assessment is not necessarily sufficient.[47] The Federal Court of Appeal went on to find that the Crown met its duty to consult as a result of: (1) the unfolding environmental assessment; (2) the consultation process; (3) the participation by the Innu of Ekuanitshit in the consultation process; (4) the consultation at each stage; (5) the nature of the Innu of Ekuanitshit's interest in the Project area; and (6) the impact of the Project on that interest.[48]

4. COMMENTARY

This case is significant for several reasons. First, at the time that the Approvals were made, the Response endorsed by the Governor-in-Council provided an explanation as to why the adverse environmental and socio-economic effects of the proposed development were outweighed by its economic benefits.[49] This differs from other environmental assessments involving joint review panels, including the case of the Shell Jackpine Mine expansion (see discussion on the decision in *Athabasca Chipewyan First Nation v. Canada (Minister of the Environment)*,[50] below), where limited or no similar explanation had been provided. Accordingly, it may be expected that future joint review panels will likely see the need to follow this approach and provide the reasoning for their determinations. Second, this decision also stands for the proposition that, even if there is uncertainty about exactly when a project might be constructed, provided there is no evidence to suggest that the project, as proposed, will not proceed, the courts will show deference to the findings of joint review panels. Finally, in assessing whether the Crown had satisfied its duty to consult in the context of an environmental assessment process, the courts will review and consider a myriad of factors.

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44 *Ibid* at para 54.
45 *Ibid* at paras 95, 122–23.
46 *Ibid* at para 99 [emphasis in original], citing *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550.
47 *Ibid* at para 100, citing *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388.
48 *Ibid* at paras 103–104, 110.
49 *Ibid* at para 25.
50 2014 FC 1185, [2015] 2 CNLR 28 [*Athabasca*].

D. *ATHABASCA CHIPEWYAN FIRST NATION V. CANADA (MINISTER OF THE ENVIRONMENT)*[51]

1. BACKGROUND

This case concerns the Crown's duties to consult with and accommodate Aboriginal peoples regarding resource development and environmental approvals when proposed projects impact traditional Aboriginal lands.[52]

2. FACTS

In 2007, Shell Canada Limited (Shell) proposed an expansion project that would increase the Jackpine Mine's bitumen production by 100,000 barrels per day (the Project). The Project would be carried out largely on the traditional lands of the Athabasca Chipewyan First Nation (the ACFN). Camps, access roads, extraction and processing facilities, utility systems, new mines, and tailing ponds would be constructed or expanded. The Project would impact twenty-one square kilometres of primarily traditional ACFN land, including 10,000 hectares of wetlands, which largely could not be reclaimed.[53] In order to move forward, the Project needed approvals from the federal Minister of the Environment.

The ACFN objected to the Project, and consultation with the Crown and Shell began in 2007. Despite the ACFN's protest, the Governor-in-Council issued an Order in Council stating that the possible environmental effects of the Project were justified, thereby granting the approvals, subject to a series of conditions binding upon Shell.[54] Allan Adam (the Applicant), on his own behalf and on behalf of the ACFN, argued that the Crown's decision breached its duties to consult with and accommodate the ACFN. He asked the Federal Court to declare the Minister's decisions invalid and to require adequate consultation and accommodation.[55]

3. DECISION

The Federal Court considered whether the Crown breached its duties to consult with and accommodate the ACFN.[56] In regard to the duty to consult, the Federal Court held that the Crown had a "deep duty" to consult the ACFN as "the risk of non-compensable damage [was] high."[57]

The Federal Court considered the fundamental components of meaningful consultation and summarized what had been done by the parties. The Federal Court found that the Crown: (1) gave the ACFN notice; (2) afforded the ACFN the opportunity for consultation; (3) seriously considered the ACFN's views; and (4) was prepared to alter the original Project

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51 *Ibid.*
52 *Ibid* at para 1.
53 *Ibid* at para 6.
54 *Ibid* at para 1.
55 *Ibid* at para 5.
56 *Ibid* at para 25.
57 *Ibid* at para 71, citing *Haida*, *supra* note 22 at para 44.

proposal.[58] The Federal Court did not find the consultation process to be rushed, nor was there a lack of transparency. To the contrary, the consultation process was still occurring as of the date of the judicial review, and there was evidence to show that the Crown shared information with the ACFN and made decisions in consideration of the ACFN's concerns.[59]

In respect of the Crown's duty to accommodate, the Federal Court held that accommodation does not need to lead to an agreement in order to be considered adequate.[60] The Federal Court determined that the Crown accommodated the ACFN's concerns by imposing a lengthy list of conditions on Shell.[61]

Accordingly, the Federal Court was satisfied that the Crown "reasonably fulfilled its duties to consult and accommodate the ACFN in order to minimize the Project's adverse environmental effects," and upheld the Order in Council.[62] The Federal Court concluded that the Crown's accommodations "bear witness to the attentive, responsive consultation that Canada has afforded the ACFN."[63]

4. COMMENTARY

This case demonstrates that the duties of consultation and accommodation are meant to aid in reconciliation between the Crown and Aboriginal groups, but the duties to consult and accommodate do not necessarily require that Aboriginal groups receive what they request from the Crown, nor do they require that Aboriginal groups and private enterprise come to an agreement that completely satisfies both parties. The actual process of consultation and accommodation is key to satisfying the Crown's duties to consult and accommodate Aboriginal groups; the tangible outcomes of the process will not necessarily be determinative.

It is noteworthy that limited reasons were provided as to why the Project was justified in the circumstances, compared with the *Innu of Ekuanitshit* decision commented on above.[64] It bears watching whether, going forward, the more fulsome justification as seen in the *Innu of Ekuanitshit* decision will prevail on future developments under review.

E. *HUPACASATH FIRST NATION V. CANADA (MINISTER OF FOREIGN AFFAIRS)*[65]

1. BACKGROUND

In *Hupacasath*, the Federal Court of Appeal held that it was only speculative that a foreign investment promotion and protection agreement between Canada and China could affect

58 *Athabasca*, *ibid* at paras 73–76.
59 *Ibid* at paras 77–79.
60 *Ibid* at para 88, citing *Haida*, *supra* note 22 at paras 45–49.
61 *Athabasca*, *ibid* at para 91.
62 *Ibid* at para 106.
63 *Ibid* at para 105.
64 *Innu of Ekuanitshit*, *supra* note 28.
65 2015 FCA 4, 379 DLR (4th) 737 [*Hupacasath*].

Aboriginal rights or interests. Therefore, the duty to consult Aboriginal groups prior to implementing such an agreement had not been triggered.

2. FACTS

The Hupacasath First Nation (Hupacasath) brought an action in Federal Court alleging that the Minister of Foreign Affairs and the Attorney General of Canada breached their duty to consult by signing a foreign investment promotion and protection agreement with the People's Republic of China (Agreement).[66]

Under the Agreement, Canada and China must treat both investors from the other country, and that country's investments, in non-discriminatory ways and compensate investors in the event of an expropriation.[67] Certain violations of the Agreement could result in arbitration where a monetary award could be levied against the home country. Hupacasath argued that the potential levies created "incentives for Canada to act in a manner that avoids breaches of the Agreement and resulting monetary awards," at the expense of and in breach of Aboriginal rights or interests.[68]

3. DECISION

The Federal Court of Appeal examined whether or not this was a situation that attracted Canada's duty to consult, applying the test set out in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*,[69] namely, whether there was: (1) real or constructive knowledge of an Aboriginal claim to the land or resource; (2) a Crown decision or action that may, or has the potential, to adversely impact an Aboriginal right, including a strategic, higher level decision; and (3) a possible causal relationship between the government decision or action and a possible adverse impact on pending Aboriginal claims or rights.[70]

The key consideration in this case was whether there was a causal relationship between the Agreement and conduct that might affect an Aboriginal claim or right.[71]

The Federal Court of Appeal held that there was "no evidence deserving of sufficient weight" that the Agreement (or others similar to it) would result in Canada making decisions that would interfere with and disrespect Aboriginal rights.[72] The Federal Court of Appeal held that Hupacasath's allegations were purely speculative noting that: "[a] conclusion is not speculative when it is reached by way of a chain of reasoning all of whose links are proven facts and inferences, joined together by logic."[73] Until there was a project where Aboriginal rights were actually affected, the duty to consult was not triggered.[74]

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66 *Ibid* at paras 1, 12 ("[t]he Agreement is similar to twenty-four other foreign investment promotion and protection agreements that Canada has signed with other nations" at para 12).
67 *Ibid* at para 13.
68 *Ibid* at para 16.
69 2010 SCC 43, [2010] 2 SCR 650 [*Rio Tinto*].
70 *Ibid* at paras 40–50.
71 *Hupacasath*, *supra* note 65 at para 85.
72 *Ibid* at para 91.
73 *Ibid* at para 117.
74 *Ibid* at paras 103–105.

4. COMMENTARY

Hupacasath demonstrates that the duty to consult is not automatically triggered by every Crown decision. A duty to consult will not be triggered in instances where governmental decisions are too far removed from directly and causally impacting Aboriginal rights. Similarly in *Buffalo River Dene Nation v. Saskatchewan (Minister of Energy and Resources)*,[75] the Saskatchewan Court of Appeal dismissed an appeal regarding the Buffalo River Dene Nation's assertion that the duty to consult was triggered when the Crown granted an exploration disposition in respect of subsurface oil sands minerals located under treaty lands. The Court held the impact on treaty rights was "no more than speculation at this juncture. While the threshold for proof of interference and a consequent triggering of the duty to consult is low, the law requires more than a merely speculative impact before the duty is triggered."[76]

II. COMPETITION

A. *TERVITA CORP. V. CANADA (COMMISSIONER OF COMPETITION)*[77]

1. BACKGROUND

Tervita deals with a merger review initiated by the Commissioner of Competition under the *Competition Act*[78] in respect of companies that operate, among other things, hazardous waste secure landfills.

2. FACTS

Tervita Corp. (Tervita) owned two hazardous waste secure landfill sites in Northeastern British Columbia that were granted two of four permits available for the area. A third permit was granted for a site that was not operational, and a fourth permit was granted for a site that was owned by Complete Environmental Inc. (Complete). Complete had not yet developed its site, but it was in discussions to either develop it or sell it to a third party.[79]

Tervita entered into an agreement with Complete to purchase Complete's shares. Even though the value of the proposed merger did not exceed the merger notification threshold, "prior to closing, the Commissioner of Competition informed the parties that she opposed the transaction on the ground that it was likely to substantially prevent competition in secure landfill services in Northeastern British Columbia."[80] The Commissioner asked the Competition Tribunal to dissolve the transaction or require Tervita to divest itself of the site. Tervita's appeal to the Federal Court of Appeal was dismissed. It obtained leave to appeal to the Supreme Court of Canada.

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75 2015 SKCA 31, [2015] 7 WWR 82.
76 *Ibid* at para 2.
77 2015 SCC 3, [2015] 1 SCR 161 [*Tervita*].
78 RSC 1985, c C-34.
79 *Tervita*, *supra* note 77 at paras 1, 3–4.
80 *Ibid* at para 7.

3. DECISION

The Supreme Court considered the appropriate test to be applied to determine when a merger results in substantial prevention of competition under section 92 of the *Competition Act*[81] and the proper approach to the efficiency defence under section 96 of the *Competition Act*.[82]

While the Supreme Court had previously considered when a proposed merger was likely to lessen competition substantially, *Tervita* was the first case where the Supreme Court considered whether a merger would likely result in a substantial prevention of competition under section 92 of the *Competition Act*. The Supreme Court held that a forward-looking "but for" analysis should be applied to determine whether the merger prevented a potential competitor, either one of the merging parties or a third party, from entering the market in a way that would sufficiently compete with the entity holding market power.[83] The Supreme Court identified Complete as a potential competitor and determined that the merger prevented it from entering the market; therefore, the merger had likely substantially prevented competition.

The Supreme Court confirmed the Competition Tribunal's decision that the merger failed the substantial prevention of competition test under section 92, and it went on to consider whether the merger could be saved by the efficiency defence available under section 96 of the *Competition Act*. Tervita was able to demonstrate marginal "overhead" efficiency gains resulting from the combination of Tervita and Complete's administrative and operating functions. Even though these gains were small, they were found to have met the requirement of the "greater than and offset" test found in section 96 of the *Competition Act* because the anti-competitive effects of the merger were never quantified by the Commissioner during the section 92 analysis.[84] The merger was therefore saved by the efficiency defence, and the Supreme Court set aside the divesture order and granted Tervita's appeal.

4. COMMENTARY

This case has particular relevance for services and midstream companies pursuing or involved in a merger process as concerns about competition are more pronounced in these subsets of the market. The decision demonstrates that the Commissioner of Competition may challenge mergers or acquisitions that are likely to prevent competition, even when the pre-merger notification threshold has not been exceeded. As well, parties pursuing a merger can likely expect more substantial documentation requests from the Commissioner as a means to better quantify the anti-competitive effects of a proposed merger. It follows that companies seeking to employ the efficiencies defence will also need to establish and better quantify the actual efficiencies arising from the proposed merger in order to overcome the anti-competitive evidence that may be introduced by the Commissioner.

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81 *Competition Act*, *supra* note 78, s 92.
82 *Ibid*, s 96.
83 *Tervita*, *supra* note 77 at paras 60–79.
84 *Ibid* at para 155.

III. CONTRACT

A. *BARAFIELD REALTY LTD. V. JUST ENERGY (B.C.) LIMITED PARTNERSHIP*[85]

1. BACKGROUND

This case discusses whether orders under the *Companies' Creditors Arrangement Act*[86] extinguish the contractual rights of parties under contracts assigned as a part of *CCAA* proceedings.

2. FACTS

Barafield Realty Ltd. (Barafield) and CEG Energy Options Inc. (CEG) were parties to a fixed rate natural gas supply contract (the Contract). The Contract contained a clause prohibiting assignment without consent of the non-assigning party and a clause that the Contract could be terminated upon the insolvency of the other party.[87]

About two years into the Contract's five-year term, CEG filed notice with the Alberta courts as an "insolvent person" and entered into receivership proceedings under the *CCAA* and the *Bankruptcy and Insolvency Act*.[88] The Alberta Court of Queen's Bench issued a Vesting Order (the Order), which included a stay of all proceedings pursuant to the *CCAA*. Pursuant to the Order, Just Energy (B.C.) Limited Partnership (Just Energy), was assigned CEG's purchased contracts (the Purchased Contracts, which included the Contract) in accordance with an asset purchase agreement (the Agreement).[89] The Agreement required CEG to obtain consents to the transfer of certain of the Purchased Contracts before closing, if applicable. In the event such consents were not obtained, Just Energy was entitled to waive delivery of the consents or rescind the Agreement. Barafield was never approached by CEG to obtain its consent to the assignment; however, the sale under the Agreement was approved by the Court of Queen's Bench in Alberta and the deal was closed.[90]

Subsequent to closing, Barafield took steps to terminate the Contract claiming breach on the basis of CEG's insolvency and that it did not consent to assignment of the Contract to Just Energy.[91] Barafield requested that Just Energy revert Barafield back to a variable rate supply agreement with Terasen, another supplier of natural gas that owned the distribution system that CEG and Just Energy used to deliver natural gas. Just Energy responded to Barafield that the Contract had not been assigned, but rather "the transaction was an *acquisition* permissible under … the contract."[92] Thus, the Contract could not be rightly terminated by Barafield.

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85 2014 BCSC 945, 13 CBR (6th) 163 [*Barafield*].
86 RSC 1985, c C-36 [*CCAA*].
87 *Barafield*, *supra* note 85 at para 1.
88 RSC 1985, c B-3.
89 *Barafield*, *supra* note 85 at paras 12, 16.
90 *Ibid* at paras 27–28.
91 *Ibid* at para 37.
92 *Ibid* at para 32 [emphasis in original].

For the remainder of the Contract term, Barafield continued to pay Just Energy for the supply of natural gas and Just Energy continued to supply gas. Barafield brought a claim in British Columbia seeking damages for the difference between the amounts paid to Just Energy for its supply of natural gas, less the amount Barafield would have paid to Terasen from the date of assignment from CEG to Just Energy until the Contract lapsed pursuant to its terms.[93]

3. DECISION

The British Columbia Supreme Court first addressed the issue of CEG's insolvency and determined that CEG was insolvent within the meaning of the Contract. Thus, Barafield was entitled to terminate the Contract on that basis.[94] The British Columbia Supreme Court went on to hold that the transfer of the Contract from CEG to Just Energy was an assignment on the terms of the Contract itself.[95]

The British Columbia Supreme Court next addressed the issue of consent. Just Energy argued that consent was not required as the Contract provided that consent could not be unreasonably withheld. The British Columbia Supreme Court dismissed this argument; as consent was never sought in the first instance, it could not be said that consent was unreasonably withheld.[96] The British Columbia Supreme Court went on to find that there were no other factors, including the Order and the stay of proceedings, that negated the need for consent to be obtained. The British Columbia Supreme Court stated that there was not a provision in the Order, the application, or in the policy underlying the *CCAA*, "that specifically dispensed with the need to obtain the plaintiffs' consent to the assignment."[97] Rather, the "*CCAA* proceedings generally do not eliminate the contractual rights of a third party to the proceedings without notice (which was not given) or compensation (which is what the plaintiffs are seeking)."[98]

As to the stay order, the British Columbia Supreme Court determined that, while Barafield was stayed from terminating the Contract with CEG, the right to terminate the Contract based on CEG's insolvency was not stayed as against Just Energy.[99] In the result, the British Columbia Supreme Court rejected all of the equitable defences forwarded by Just Energy and concluded that Barafield was entitled to damages in the amount requested.

4. COMMENTARY

Following the commencement of the action in *Barafield*, the *CCAA* was amended and clarified to provide that, subject to certain exceptions, a court may make an order assigning a contractual right or obligation of a debtor company upon notice to every person to such contract.[100] As a result, the landscape has changed. Nevertheless, an entity that is taking an

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93 *Ibid* at paras 35–36.
94 *Ibid* at para 42.
95 *Ibid* at para 46.
96 *Ibid* at para 52.
97 *Ibid* at para 62.
98 *Ibid* at para 89.
99 *Ibid* at para 104.
100 *CCAA*, *supra* note 86, s 11.3.

assignment of a contract from a party involved in *CCAA* proceedings must be mindful of the existing contractual provisions, and should consider carefully whether notice of the assignment has been given in accordance with the *CCAA*, or whether counterparty consent should be obtained.

B. *IFP TECHNOLOGIES (CANADA) INC. V. ENCANA MIDSTREAM AND MARKETING ET AL.*[101]

1. BACKGROUND

In *IFP Technologies*, the Alberta Court of Queen's Bench addressed the issue of when it is reasonable to withhold consent to the assignment of a contract and the consequences of unreasonably withholding such consent. The issue arose in the context of a dispute between the participants in an oil and gas project whereby the operator disposed of its working interest by way of a farmout agreement and the non-operator withheld its consent to the disposition. The nature of the non-operator's working interest was also at issue, specifically, whether the non-operator's working interest was limited to thermal and other enhanced recovery projects or covered all forms of oil recovery.

2. FACTS

The factual matrix of this case is complex, but for the purposes of this article the following simplified summary of the facts is sufficient. There were three primary parties: IFP Technologies (Canada) Inc. (IFP), PanCanadian Resources (PCR) together with its partners, and the Wiser Oil Company of Canada together with Wiser Oil Company (collectively, Wiser).[102] IFP had certain expertise relating to "the drilling, placement and completion of horizontal wells for the enhanced production of oil and gas."[103] PCR had various oil and gas properties, including the heavy oil property, Eyehill Creek (the Property).[104] PCR and IFP decided to develop the Property using the application of thermal or other enhanced recovery technologies.[105] Through a series of agreements, including a joint operating agreement (the JOA), IFP acquired a 20 percent working interest in the Property.[106] A memorandum of understanding (the MOU) entered into between the parties indicated that IFP's working interest would cover all methods of recovery while the JOA purportedly limited IFP's working interest to only thermal or enhanced recovery methods.[107] As a result, the nature of IFP's working interest was also commented on by the Court of Queen's Bench.[108]

For a number of reasons, PCR negotiated the disposition of its working interest in the Property to Wiser by way of a farmout agreement (the Farmout Agreement).[109] Under the terms of the Farmout Agreement, Wiser was to take responsibility for the pre-existing wells

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101 2014 ABQB 470, 591 AR 202 [*IFP Technologies*].
102 *Ibid* at paras 6–10.
103 *Ibid* at para 16.
104 *Ibid* at para 21.
105 *Ibid* at para 29.
106 *Ibid* at paras 30, 33.
107 *Ibid* at paras 29, 33.
108 *Ibid* at para 58.
109 *Ibid* at paras 35, 37.

on the Property and would be able to drill new wells should it choose to do so.[110] Wiser's operations would be based on primary and not thermal or other enhanced recovery techniques.[111] In accordance with a modified version of the 1990 Canadian Association of Petroleum Landmen (1990 CAPL) Operating Procedure which was attached to the JOA as a schedule, IFP had been granted a right of first refusal.[112] In the event it did not exercise its right of first refusal, PCR had to obtain IFP's consent to proceed with a disposition, including the transaction contemplated by the Farmout Agreement.[113] Specifically, the 1990 CAPL attached to the JOA stated:

> [T]he disposition to the proposed assignee shall be subject to the consent of the offerees. Such consent shall not be unreasonably withheld, and it shall be reasonable for an offeree to withhold its consent to the disposition if it reasonably believes that the disposition would be likely to have a material adverse effect on it, its working interest or operations to be conducted.[114]

PCR sent IFP a right of first refusal notice with respect to the Farmout Agreement.[115] IFP responded, withholding its consent by not exercising its right of first refusal.[116] In its letter, IFP took the position that:

> Primary development of undeveloped portions of the Eyehill Creek Lands will effectively prevent or severely affect future thermal or enhanced recovery schemes on these lands and will thereby substantially reduce the value of IFP's interest in these lands.
>
> Therefore, IFP has determined that the potential sale by PanCanadian to Wiser of the Eyehill Creek Lands will have a material adverse effect on IFP's working interests and operations in such lands.[117]

Despite the failure to obtain IFP's consent, PCR and Wiser completed the transaction contemplated by the Farmout Agreement. IFP commenced an action against PCR for breach of contract.[118] PCR and Wiser counterclaimed for a declaration that IFP wrongfully withheld its consent.[119]

3. DECISION

Regarding the issue of the nature of IFP's working interest, the Court of Queen's Bench ultimately found that IFP's working interest was limited to thermal or other enhanced recovery, but PCR's interest was not similarly limited.[120] In this instance, the Court of Queen's Bench found that, through a complex interplay of contractual provisions, the terms of the JOA governed the nature of IFP's working interest.[121] As a result, it concluded that

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110 *Ibid* at para 40.
111 *Ibid* at para 148.
112 *Ibid* at paras 30, 110–11.
113 *Ibid* at paras 111–12.
114 *Ibid* at para 111.
115 *Ibid* at para 147.
116 *Ibid* at para 149.
117 *Ibid*.
118 *Ibid* at para 1.
119 *Ibid* at para 3.
120 *Ibid* at para 194.
121 *Ibid* at para 97.

clause 4(c) of the JOA applied to limit IFP's working interest to thermal and other enhanced recovery. Clause 4(c) provided:

> It is specifically agreed and understood by the parties that the working interests of the parties as described in Clause 5 of this Agreement relate exclusively to thermal or other enhanced recovery schemes and projects which may be applicable in respect of the petroleum substances found within or under the Joint Lands and the Title Documents. Unless specifically agreed to in writing, IFP will have no interest and will bear no cost and will derive no benefit from the recovery of petroleum substances by primary recovery methods from any of the rights otherwise described as part of the Joint Lands or the Title Documents.[122]

The Court of Queen's Bench went on to find that the Farmout Agreement and IFP's waiver of its right of first refusal triggered the consent provisions. The Court of Queen's Bench next turned to the issue of whether it was reasonable for IFP to withhold its consent. In determining whether it is reasonable for a party to withhold consent, the Court of Queen's Bench found that: "The court should not defer to the party withholding consent, but must assess the reasons for withholding consent and consider *whether a reasonable person in similar circumstances would have made the same decision*. The court should consider the purpose of the consent clause and the meaning and benefit it was intended to confer."[123] The Court of Queen's Bench found that IFP's belief that the Farmout Agreement would have a material adverse effect on its working interest or future operations was not objectively reasonable.[124] As a result, it was unreasonable in withholding its consent.

In its analysis, the Court of Queen's Bench was strongly influenced by comparing the situation under the Farmout Agreement to the status quo.[125] The Court of Queen's Bench noted that there was nothing in the agreements between IFP and PCR which prohibited PCR itself from engaging in primary recovery, which PCR was already doing.[126] Consequently, the fact that Wiser would only undertake primary production was an insufficient basis to withhold consent and prohibit the alienation of PCR's interest.[127]

The Court of Queen's Bench also considered the relevance of the reasonable expectations of the parties. In particular, the Court of Queen's Bench relied on *Mesa Operating Ltd. Partnership v. Amoco Canada Resources Ltd.*[128] for the principles that "a general good faith contractual obligation is not part of Alberta law"[129] and "the alleged reasonable expectations must be consistent with the express terms of the relevant agreements."[130] The Court of Queen's Bench found that, since there was nothing in the agreement prohibiting primary recovery, it was not a reasonable expectation that PCR would not pursue primary recovery.[131]

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122 *Ibid* at para 92.
123 *Ibid* at para 158 [emphasis added].
124 *Ibid* at para 198.
125 *Ibid* at para 193.
126 *Ibid* at para 198.
127 *Ibid*.
128 (1994), 19 Alta LR (3d) 38 (QB) [*Mesa*].
129 *IFP Technologies*, *supra* note 101 at para 203. See also *Mesa*, *ibid* at paras 15–19. Note: the Supreme Court of Canada decision in *Bhasin v Hrynew*, 2014 SCC 71, [2014] 3 SCR 494 [*Bhasin*] has now established a duty of honest contractual performance (see discussion below).
130 *IFP Technologies*, *ibid* at para 211. See also *Mesa*, *ibid* at para 19.
131 *Ibid* at para 212.

The Court of Queen's Bench proceeded to consider the consequences of IFP unreasonably withholding its consent. The Court of Queen's Bench held that unreasonably withholding consent has the effect of dispensing with the consent requirement, relying on principles of landlord-tenant law.[132] Therefore, the Court of Queen's Bench found that PCR was free to proceed with the Farmout Agreement and, because there was no breach of the consent requirement, Wiser was novated into the agreements, including the JOA.[133]

4. COMMENTARY

This case is important because of its discussion of when it is reasonable to withhold consent. The Court of Queen's Bench appears to narrowly interpret reasonableness as being determined on the basis of the objective expectations of the parties based on the express terms of the agreement.

Accordingly, given the facts of this case, the Court of Queen's Bench determined that it was not objectively reasonable for IFP to withhold its consent because the contractual relationships in place did not preclude, and indeed expressly allowed, primary production. Clearly, in a determination as to the reasonableness of withholding consent, although there are generally applicable principles, the relevant facts will be of crucial importance.

With respect to how the working interest of IFP was characterized, being limited to thermal or enhanced recovery techniques, while this finding may accord with the contractually described intentions of the parties, such a determination does not seem consistent with how energy practitioners might typically view a working interest.

A working interest is generally thought of as an interest in land, or a category of property right in relation to mineral substances *in situ*. By limiting IFP's ownership right to only substances produced through thermal or enhanced recovery techniques, the Court of Queen's Bench seems to be suggesting that IFP actually holds a property right other than a true working interest, and this is notwithstanding the use of the term "working interests" by the parties in their underlying contracts.

C. *SATTVA CAPITAL CORP. V. CRESTON MOLY CORP.*[134]

1. BACKGROUND

Sattva involved a dispute with respect to the interpretation of certain provisions in an agreement that related to the payment of a finder's fee. The parties entered into arbitration pursuant to the British Columbia *Arbitration Act*.[135] In a series of decisions, leave to appeal the arbitrator's decision was granted by the British Columbia Court of Appeal, which subsequently allowed the appeal on its merits.

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132 *Ibid* at paras 214–15.
133 *Ibid* at paras 216–19.
134 2014 SCC 53, [2014] 2 SCR 633 [*Sattva*].
135 RSBC 1996, c 55.

In its decision, the Supreme Court of Canada addressed several important issues relating to contractual interpretation and when a court should grant leave to appeal from an arbitrator's decision under the *Arbitration Act*.

2. FACTS

Creston Moly Corporation (Creston) and Sattva Capital Corporation (Sattva) entered into an agreement (the Agreement), pursuant to which Sattva would receive a finder's fee in exchange for introducing Creston to the opportunity to acquire a molybdenum mining property (the Property).[136] Under the terms of the Agreement, the finder's fee was to equal the maximum amount payable pursuant to the rules and policies off the TSX Venture Exchange. The finder's fee was to be payable in shares of Creston or, at the sole option of Sattva, a combination of shares and cash.[137]

Following Creston's acquisition of the Property, Sattva was entitled to the finder's fee, calculated in the amount of US$1.5 million.[138] At Sattva's election, this amount was to be satisfied through the issuance by Creston to Sattva of Creston shares.[139] However, the parties disagreed as to what date should be used to determine the price of the shares and therefore the number of shares that were to be issued by Creston.[140] Sattva took the position that it was entitled to 11,460,000 shares based on a price of $0.15.[141] Creston took the position that Sattva was entitled to a fewer number of shares, 2,454,000, based on a price of $0.70.[142]

The parties commenced arbitration under the *Arbitration Act*. The arbitrator found in favour of Sattva. The trial court denied leave to appeal on the basis that the issue was not a question of law but a question of mixed law and fact. The Court of Appeal reversed the decision and granted leave to appeal on the basis that the failure of the arbitrator to address a provision of the Agreement raised a question of law, and the matter was referred back to the trial court. The trial court subsequently upheld the arbitrator's interpretation of the Agreement and dismissed the appeal. The Court of Appeal again reversed the decision of the lower court and allowed the appeal on its merits, in favour of Creston.[143] Sattva appealed both the decision to grant leave and the appeal decision.

3. DECISION

The Supreme Court held that the historical approach in which the interpretation of a contract is considered to be a pure question of law should be approached more broadly.[144] The Supreme Court held that: "Contractual interpretation involves issues of *mixed fact and law* as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, *considered in light of the factual matrix*."[145]

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136 *Sattva*, *supra* note 134 at paras 2–3.
137 *Ibid* at para 111 (citing section 3.1 of the Agreement).
138 *Ibid* at para 5.
139 *Ibid* at paras 14–15.
140 *Ibid* at para 7.
141 *Ibid*.
142 *Ibid* at para 8.
143 *Ibid* at paras 11–30.
144 *Ibid* at para 50.
145 *Ibid* [emphasis added].

However, the Supreme Court held that, in limited circumstances, "it may be possible to identify an extricable question of law."[146] Some of the examples that the Supreme Court provided include: (1) the application of an incorrect principle; (2) the failure to consider a required element of a legal test or the failure to consider a relevant factor; (3) the requirements for the formation of a contract; (4) the capacity of the parties; and (5) the requirement that certain contracts be evidenced in writing.[147]

The Supreme Court also considered the role and nature of surrounding circumstances in contractual interpretation and the nature of the evidence that can be considered. Regarding the nature of the evidence to be considered, the Supreme Court stated that, subject to the parol evidence rule: "It should consist only of objective evidence of the background facts at the time of the execution of the contract … that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting."[148]

The Supreme Court concluded that, while the failure to take into account a provision of a contract would be a question of law, this question of law was not properly extricable in this instance. The Court of Appeal was more concerned with how the provision was considered.[149] As a result, the Supreme Court found that the Court of Appeal had erred in granting leave.[150]

The Supreme Court further concluded that even if it had been a question of law, the Court of Appeal should have still denied leave to appeal on the basis that the application also failed to meet the miscarriage of justice and residual discretion elements, as required under the *Arbitration Act*.[151] In determining whether there would be a miscarriage of justice, the Supreme Court held that "an alleged legal error must pertain to a material issue in the dispute which, if decided differently, would affect the result of the case."[152] Further, the Supreme Court held that the appropriate threshold is whether it has arguable merit, and that the standard of review in commercial arbitrations will almost always be reasonableness.[153] The Supreme Court concluded that there was no arguable merit to the suggestion that the arbitrator's decision was unreasonable and there was no miscarriage of justice.[154]

In considering when it is appropriate to exercise discretion under the *Arbitration Act*, the Supreme Court provided a non-exhaustive list of factors, which included: (1) the conduct of the parties; (2) the existence of alternative remedies; (3) undue delay; and (4) the urgent need for a final answer.[155] The Supreme Court found that, given the misleading conduct of Creston, the trial court was justified in denying leave to appeal and that the Court of Appeal should have been deferential to the trial court.[156]

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146 *Ibid* at para 53 [citation omitted]. See also *Housen v Nikolaisen*, [2002] 2 SCR 235 at paras 31, 34–35.
147 *Sattva*, *ibid* at para 53 [citation omitted].
148 *Ibid* at para 58 [citation omitted].
149 *Ibid* at paras 62, 65–66.
150 *Ibid* at para 66.
151 *Ibid* at para 67.
152 *Ibid* at para 70.
153 *Ibid* at paras 74–75.
154 *Ibid* at para 84.
155 *Ibid* at para 91.
156 *Ibid* at para 100.

4. COMMENTARY

As a result of the conclusion reached in this case that, except in very limited circumstances, the interpretation of a contract is a question of mixed fact and law, it may now be more difficult for parties to a contractual dispute to obtain leave to appeal from an arbitrator's decision. The case indicates that finders of fact, including arbitrators, are entitled to a higher degree of deference by appellate courts with respect to their interpretation of contracts.

D. *BHASIN V. HRYNEW*[157]

1. BACKGROUND

Bhasin has received considerable attention. It involved a dispute over a dealership contract that included elements somewhat akin to an employment contract, and somewhat akin to a franchise contract, both being the types of contracts that Canadian courts have established will attract a duty of good faith contractual performance. In its analysis, the Supreme Court of Canada created a new Canadian common law duty which requires parties to perform contractual obligations honestly.

2. FACTS

Harish Bhasin (Bhasin) was an enrolment director who sold education savings plans to investors for Canadian American Financial Corporation (Can-Am).[158] Bhasin had a contract with Can-Am that included an automatic renewal clause at the end of a three-year term unless one of the parties gave six months written notice to the contrary.[159] The contract also contained an entire agreement clause.[160]

Bhasin's relationship with Can-Am soured after Larry Hrynew, another enrolment director, attempted to force Bhasin to merge their companies so he could access Bhasin's clients, which Bhasin refused.[161] As well, Can-Am was concerned with Alberta securities law issues and had many discussions with the Alberta Securities Commission where it indicated it was planning on restructuring its agencies. The restructuring plans included Bhasin working for Hrynew; however, Can-Am withheld this information from Bhasin despite his specific request for information in that regard.[162]

Can-Am then appointed Hrynew to be a compliance officer, responsible for auditing all of the enrolment directors in Alberta in an attempt to comply with Alberta securities laws. Bhasin and another enrolment director complained to Can-Am, however, Can-Am falsely responded that Hrynew was obligated to treat all information he learned confidentially and that the Commission refused a proposal to have an outside party audit the enrolment

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157 *Bhasin*, *supra* note 129.
158 *Ibid* at paras 1–2.
159 *Ibid* at para 6.
160 *Ibid* at para 16.
161 *Ibid* at para 9.
162 *Ibid* at paras 11–12.

directors.[163] Bhasin continued to disallow Hrynew to audit his records and Can-Am responded by giving a notice of non-renewal under the Agreement.[164]

Bhasin filed a claim against Can-Am, arguing that it owed a general duty of good faith under the contract. The Alberta Court of Queen's Bench implied a term of good faith into the contract between the parties. The trial judge held that such a term had been breached; Can-Am acted dishonestly with Bhasin throughout the events leading up to the non-renewal, and it misled him as to its restructuring plans.[165] The Alberta Court of Appeal allowed Can-Am's appeal and held that a term of good faith could not be implied into an unambiguous contract with an entire agreement clause.[166]

3. DECISION

The Supreme Court held that, in the Canadian common law system, there is "a general organizing principle of good faith" that underlies many facets of contract law and that recognizes a specific duty on contracting parties to perform contracts honestly in accordance with commercial expectations.[167] The Supreme Court refused Bhasin's submissions that there is a blanket common law duty of good faith in Canadian contract law, but did endorse the notion that there is a new common law duty of honest contractual performance, which requires the parties to be honest with each other in the performance of their contractual obligations. Parties may not lie or otherwise knowingly mislead each other about matters directly related to performance of the contract.[168]

The Supreme Court clarified that the new duty was not to be conflated with a duty of disclosure or fiduciary duty. Parties to a contract do not have a general duty to subordinate their interests in favour of the other party. Rather, there is an obligation of a minimum standard of honesty that parties to a contract must adhere to while performing under the contract.[169]

The Supreme Court reinstated the trial court's finding that Can-Am breached its contract with Bhasin when it failed to act honestly in exercising the non-renewal clause.[170]

4. COMMENTARY

The *Bhasin* decision takes an important step in the Canadian common law of contracts. Although the Supreme Court was not prepared to hold that there is a general duty of good faith in contractual performance, the Supreme Court's description of good faith as a "general organizing principle" of contract law arguably leaves open the possibility that courts may be open to accepting a duty of good faith in certain, new, circumstances. For example, the Supreme Court suggested that long-term contracts of mutual cooperation may be more

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163 *Ibid* at para 10.
164 *Ibid* at para 9.
165 *Ibid* at para 15.
166 *Ibid* at para 16.
167 *Ibid* at paras 62–63.
168 *Ibid* at para 73.
169 *Ibid* at para 86.
170 *Ibid* at para 103.

greatly impacted by the general organizing principle of good faith than would a more transactional exchange. In the energy industry context, both of these types of contracts are prevalent, so it remains to be seen how this part of the decision will impact the dealings of industry participants. At minimum, contracting parties need to be aware that the Supreme Court has not closed the door to good faith arguments.

In relation to the new duty of honest contractual performance, the concept is somewhat more straightforward. Contracting parties must not lie or knowingly mislead, and practitioners must be cognizant of this obligation for themselves and their clients. The Supreme Court indicated that contracting parties may modify the concept of honest contractual performance, so long as the "minimum core requirements" are respected.

It can be expected that *Bhasin* will result in more litigation as litigants seek to better define the boundaries of good faith and honest performance.

IV. EMPLOYMENT AND LABOUR

A. *SUNCOR ENERGY INC. V. UNIFOR, LOCAL 707A (RANDOM ALCOHOL AND DRUG TESTING POLICY), RE*[171]

1. BACKGROUND

Suncor was the first reported arbitration decision in Alberta following the Supreme Court of Canada's decision in C*ommunications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper Ltd.*,[172] which considered whether an employer may unilaterally implement a random drug and alcohol testing policy in a dangerous workplace where there is an alleged problem with alcohol and drug misuse.

2. FACTS

Suncor Energy Inc.'s (Suncor) workplace is comprised of unionized employees, contractor employees, and non-unionized employees.[173] In May 2012, Suncor unilaterally implemented a random drug and alcohol policy whereby only unionized employees in "safety sensitive" positions in Suncor's oil sands operations near Fort McMurray (multiple sites) were obligated to undergo random drug and alcohol testing (the Policy). Approximately 82 percent of unionized employees were in positions classified as "safety sensitive," and therefore subject to random testing.[174]

Unifor, Local 707A filed a grievance on 19 July 2012 resulting in a hearing before the Alberta Arbitration panel (Panel). The Policy was to come into effect on 15 October 2012,

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171 (2014), 242 LAC (4th) 1 (Alta GAA) [*Suncor*].
172 2013 SCC 34, [2013] 2 SCR 458 [*Irving*].
173 *Suncor*, *supra* note 171 at para 2.
174 *Ibid* at para 16.

but the Alberta Court of Queen's Bench granted an injunction preventing the implementation of the Policy until the release of the arbitration decision.[175]

Suncor alleged that there was a pervasive and persistent culture of alcohol and drug use at its sites which justified the implementation of the Policy.

3. DECISION

The majority of the Panel reviewed whether Suncor was justified in unilaterally implementing the Policy in accordance with the reasons set out by the Supreme Court of Canada in *Irving*. The Panel examined a number of issues including: (1) its jurisdictional ability to consider the method of testing (urinalysis); (2) what constitutes a "problem" and what is a "workplace" post-*Irving*, to justify implementation of a random drug and alcohol testing policy; and (3) whether there was a drug problem at Suncor's sites.[176]

The majority of the Panel then considered whether or not it was able to look at all of the alcohol or drug related incidents at the Suncor sites, or only those related to the unionized employees. The majority held that they were only able to look at incidents of alcohol and drug use relating to unionized employees. Looking at that smaller sample, it was not clear to the majority that there were drug and alcohol issues at Suncor's facility. Consequently, there was insufficient evidence showing a significant problem with unionized members in the workplace.[177] The Panel struck down the Policy.

4. COMMENTARY

Employers in Alberta have long attempted to respond to the issue of prevalent alcohol and drug use by employees in the province. However, unlike the general acceptance and application of random drug and alcohol testing by employers in the United States, *Suncor* confirmed that Canadian employers cannot currently implement random drug and alcohol testing policies without there being sufficient evidence of actual substance abuse specific to the worksite in question (pending judicial review of the Panel's decision). It is not sufficient for a worksite to require greater safety awareness during operations for a random drug and alcohol policy to be implemented; there must be a drug or alcohol abuse issue readily present and provable amongst the workers who will be subject to such random testing.[178]

Presently in Alberta, reasonable cause, post-accident, and return from substance abuse leave drug and alcohol testing are acceptable for safety sensitive positions;[179] however, *Suncor* suggests decision-makers will continue to prioritize privacy concerns of employees over unsubstantiated safety concerns of employers when applying the proportionate analysis test set out in *Irving*. As stated in *Irving*: "[A]n employer would be justifiably pessimistic

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175 *Ibid* at para 17. A review of this decision can be found at *Communications, Energy and Paperworks Union, Local 707 v Suncor Energy Inc*, 2012 ABQB 627, 548 AR 195, aff'd 2012 ABCA 373, 539 AR 206.

176 *Suncor*, *ibid* at paras 190, 232.

177 *Ibid* at para 344.

178 The judicial review of *Suncor* was heard in November 2014, and the decision was pending as of the date of publication.

179 *Irving*, *supra* note 172 at para 30.

that a policy unilaterally imposing random alcohol testing in the absence of reasonable cause would survive arbitral scrutiny."[180] *Suncor* supports the principle from *Irving* that it is extremely unlikely that a random drug and alcohol testing policy absent tangible evidence supporting a substance abuse culture at the worksite in question will be upheld by arbitral or judicial scrutiny.

V. ENVIRONMENTAL LAW

A. HYDRAULIC FRACTURING DECISIONS

1. *ERNST V. ENCANA CORP.*[181]

Ernst I involved a dispute between a landowner (the Landowner), EnCana Corporation (EnCana), the Energy Resources Conservation Board (the Board) (now the Alberta Energy Regulator), and Her Majesty the Queen in Right of the Province of Alberta (Alberta). The Landowner brought an action against EnCana alleging negligence, among other claims, in relation to EnCana's hydraulic fracturing operations, which the Landowner alleged had resulted in the contamination of her well water. The Landowner also brought a claim against the Board and Alberta for failing to investigate and remediate. The Board brought an application to strike all paragraphs in the statement of claim against it on the basis that it failed to disclose a reasonable cause of action. The case management judge found that the proposed negligence claim against the Board was unsupported by law and that any claim against the Board was barred by the statutory immunity provision in the Alberta *Energy Resource Conservation Act*.[182] The Landowner appealed the decision.

The Alberta Court of Appeal found that the case management judge correctly applied the test in determining that the Board did not owe the Landowner a duty of care.[183] Similarly, the Court of Appeal also found that the case management judge had correctly interpreted the statutory immunity provision in the *Energy Resource Conservation Act* as barring such a claim against the Board.[184]

2. *ERNST V. ENCANA CORP.*[185]

This separate case involves the same dispute as *Ernst I* above.[186] In this case, Alberta also brought an application to strike all paragraphs in the statement of claim against it on the basis that it failed to disclose a reasonable cause of action.[187]

The Alberta Court of Queen's Bench found that there was a reasonable prospect that the Landowner would succeed in establishing that Alberta owed her a prima facie duty of care.[188]

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180 *Irving*, *supra* note 172 at para 53.
181 2014 ABCA 285, [2014] 11 WWR 496 [*Ernst I*].
182 *Ibid* at paras 4–5, citing *Energy Resources Conservation Act*, RSA 2000, c E-10, s 43. See also the new, similar provision in the *Responsible Energy Development Act*, SA 2012, c R-17.3, s 27.
183 *Ernst I*, *ibid* at para 19.
184 *Ibid* at para 22.
185 2014 ABQB 672, [2015] 1 WWR 719 [*Ernst II*].
186 *Ibid* at para 1.
187 *Ibid* at para 5.
188 *Ibid* at para 56.

In particular, the Court of Queen's Bench found that the Landowner may be able to establish sufficient proximity between her and Alberta in relation to the reasonable foreseeable harm of contaminated well water from hydraulic fracturing.[189] In its application, Alberta also sought to rely on the statutory immunity clauses in the Alberta *Environmental Protection and Enhancement Act*[190] and the Alberta *Water Act*.[191] However, the Court of Queen's Bench held that the immunity clauses only applied to individuals acting pursuant to this legislation and did not include Alberta in its own right.[192]

3. COMMENTARY ON ERNST DECISIONS

The recent findings in the ongoing *Ernst* litigation had very different results; the action against the Board was struck, while the action against Alberta will continue. The simple explanation of this different treatment may be that the legislation applicable to the Board bars the claim against it, whereas the legislation applicable to Alberta does not.

Nevertheless, despite this possible "complete" answer, in each of the separate decisions, the courts conducted an analysis of whether a duty of care was owed and concluded that, while the Board did not owe a private duty of care to the Landowner, there was a reasonable prospect of the Landowner establishing a duty of care owed by Alberta. This result seems somewhat unusual in that most energy law practitioners might have expected the Board to be at least as proximate in its on-the-ground dealings with the Landlord as would be the province through Alberta Environment.

4. *WESTERN CANADA WILDERNESS COMMITTEE V. BRITISH COLUMBIA (OIL AND GAS COMMISSION)*[193]

The Western Canada Wilderness Committee (Western) brought a petition for judicial review of the granting of short term approvals under the British Columbia *Water Act*[194] to oil and gas companies — in particular, those involved in hydraulic fracturing. The main issue was whether the *Water Act* permitted recurrent short term approvals. It was Western's position that:

> The Commission grants repeated Section 8 Approvals that combine to authorize companies to use or divert water for more than one term and for more than 24 months. While no Section 8 Approval singularly exceeds

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189 *Ibid* at para 50.
190 RSA 2000, c E-12, s 220.
191 RSA 2000, c W-3, s 157.
192 *Ernst II*, *supra* note 185 at para 70.
193 2014 BCSC 1919, [2015] 1 WWR 564 [*Western*].
194 *Water Act*, RSBC 1996, c 483. Section 8 states:

(1) If diversion or use of water is required for a term not exceeding 24 months, the comptroller or a regional water manager may, on application, without issuing a licence, grant an approval in writing, approving the diversion or use, or both, of the water on the conditions the comptroller or regional water manager considers advisable.
(2) Even though a licence has not been issued, a person is not prohibited from diverting or using water in accordance with an approval given under this section or in accordance with the regulations.
(3) The provisions respecting a licence, except section 7, apply to a diversion or use of water under an approval under subsection (1) of this section or under the regulations.

> one term or the statutory limit, multiple approvals are routinely granted over multiple years to the same company, for the same purposes, at the same locations and thereby violate s. 8 of the *Water Act*.[195]

The British Columbia Supreme Court ultimately concluded that there was nothing that excluded the granting of successive or recurrent short term approvals under the *Water Act*.[196] In its analysis, the British Columbia Supreme Court considered various principles of statutory interpretation and the fact that a new application must be made for any recurrent short term approval, and that there was nothing to indicate that previous section 8 short term approval holders are favoured in respect of new section 8 approvals.[197] The British Columbia Supreme Court showed deference to the Oil and Gas Commission in respect of the granting of recurrent short term approvals, which involved a full review of comprehensive information in respect of each application for a recurrent approval.[198]

B. DARLINGTON NUCLEAR DECISIONS

1. *GREENPEACE CANADA V. CANADA (ATTORNEY GENERAL)*[199]

Ontario Power Generation proposed new nuclear reactors at the Darlington Nuclear Generation Station (the Project). There was an environmental assessment conducted pursuant to the *CEAA 1992*.[200] The environmental assessment report (the Report) concluded that the Project was "not likely to cause significant adverse environmental effects, provided the mitigation measures proposed and the commitments made … are implemented."[201] Greenpeace Canada (Greenpeace) brought an application for judicial review challenging the environmental assessment and the Report.[202] The primary issue was whether there was a failure to assess the Project in accordance with the *CEAA 1992*.[203] It is important to note that the Project was being assessed at an early stage. The reactor technology had not yet been selected.[204] As a result, Ontario Power Generation employed a plant parameter envelope (PPE) technique in which it considered several different reactor technologies, identified salient design elements, each with a value representing the greatest potential to result in an adverse environmental effect, to give an idea of the maximum expected environmental impact.[205] Greenpeace challenged the use of the PPE approach arguing that it was not a "project" within the meaning of the *CEAA 1992*. Greenpeace argued that for the PPE to be a project, the specific nature of the proposed physical work from start to finish and the preferred means of carrying it out needed to be defined. Greenpeace further argued that even if the proposal was a project, it was an error to accept this approach since it would result in a failure to fully consider the environmental effects thereof.[206]

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195 *Western*, *supra* note 193 at para 40.
196 *Ibid* at para 143.
197 *Ibid* at paras 143–44.
198 The British Columbia Bill 18, *Water Sustainability Act*, 2nd Sess, 40th Leg, British Columbia, 2014, cl 10(3) (assented to 29 May 2014), SBC 2014, c 15 is expected to come into force in 2016. It expressly authorizes the Commission to grant recurring short-term approvals.
199 2014 FC 463, 455 FTR 1 [*Greenpeace I*].
200 *Supra* note 31.
201 *Greenpeace I, supra* note 199 at para 10.
202 *Ibid* at para 11.
203 *Ibid* at para 175.
204 *Ibid* at para 5.
205 *Ibid*.
206 *Ibid* at paras 42, 45.

The Federal Court concluded that while the Panel had sufficient information to conduct, and did conduct, an environmental assessment that provided the decision-makers with an adequate basis on which to make decisions, there were three aspects of the Report which were problematic and required re-assessment:[207](1) gaps in the bounding scenario regarding hazardous substance emissions and on-site chemical inventories;[208] (2) the long-term management and disposal of used nuclear fuel;[209] and (3) the deferral of the analysis of a severe common cause accident.[210] The Federal Court held that the problematic findings did not vitiate the whole Report, but that some reconsideration and corrective action was required.[211] Regarding whether the Project satisfied the definition of "project" under the *CEAA 1992*, the Federal Court concluded that it did because it referred to four specific reactor options and was not hypothetical.[212]

This case exemplifies the deference that courts will show to environmental assessment review panels. The Federal Court was not prepared to entirely quash the report and recommendations of the Panel, even though some deficiencies were identified. Rather, the specific deficiencies were returned to the Panel to be reconsidered and addressed prior to the Project proceeding. Project proponents can take some comfort in this decision as it suggests a limited number of deficiencies which are capable of being addressed will not necessarily result in a *de novo* review.

2. *GREENPEACE CANADA V. CANADA (ATTORNEY GENERAL)*[213]

Ontario Power Generation proposed to refurbish four nuclear reactors at the Darlington Nuclear Generation Station (the Refurbishment). This triggered an environmental assessment under the *CEAA 1992*.[214] The responsible federal authorities (the RAs) conducted the assessment and issued their decision in which it was concluded that the Refurbishment was not likely to cause significant adverse environmental effects.[215] Greenpeace Canada (Greenpeace) brought an application for judicial review of the decision, arguing that, the RAs had erred by excluding low-probability, high-severity nuclear accidents from the scope of the environmental assessment.[216]

The Federal Court concluded that the RAs had not erred. The Federal Court noted that the RAs had articulated a probability threshold for the type of accidents they would consider and therefore met the requirements under the *CEAA 1992*.[217] The Federal Court found "[t]he assertion that an RA must consider any accident which may possibly occur is unsustainable in reality and law. Particularly, since the goal of the EA process is a determination as to whether a project is 'likely' or 'not likely' to cause significant adverse effects."[218]

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207 *Ibid* at para 228.
208 *Ibid* at para 250.
209 *Ibid* at para 283.
210 *Ibid* at paras 319.
211 *Ibid* at para 394.
212 *Ibid* at para 129.
213 2014 FC 1124, 92 CELR (3d) 233 [*Greenpeace II*].
214 *Ibid* at para 1.
215 *Greenpeace II*, *ibid* at para 21.
216 *Ibid* at para 22.
217 *Ibid* at paras 41–43.
218 *Ibid* at para 44.

The significant finding of the Federal Court in this regard was that high impact, but low probability events (that is, events with a 1 in 1,000,000 chance per year) did not warrant consideration in an environmental assessment review. By excluding these types of events, the Federal Court determined that the scope of assessment outlined by the RAs was not unreasonable, particularly because the RAs justified their scope on the basis of prevailing international standards.

This decision is again demonstrative of the deference courts will show to environmental review panels, particularly when such panels can provide valid justifications for their findings.

C. *SYNCRUDE CANADA LTD. V. CANADA (ATTORNEY GENERAL)*[219]

1. BACKGROUND

This case involves a constitutional challenge of federal regulations which require diesel fuel to contain a certain proportion of renewable fuel.

2. FACTS

The *Canadian Environmental Protection Act, 1999* prohibits a person from producing, importing or selling fuel that does not meet the prescribed requirements.[220] Among these prescribed requirements is the requirement that diesel fuel contain at least 2 percent renewable content by volume (the Fuel Requirement).[221] The Fuel Requirement came into effect on 2 July 2011 and is found in the *Renewable Fuels Regulations* under the *CEPA 1999*.

Syncrude Canada Ltd. (Syncrude), which purchases and produces its own diesel fuel for use in its Alberta oil and gas operations, brought an application challenging the constitutionality of the Fuel Requirement on the basis that it is outside the federal government's authority.[222] In its application, Syncrude also challenged a decision of the Minister denying Syncrude's request to convene a board of review in relation to the Fuel Requirement.[223] The scope of this summary is limited to the aspects of the case which relate to the constitutionality of the Fuel Requirement.

3. DECISION

The Federal Court concluded that the Fuel Requirement was within the Federal Government's authority.[224] The Federal Court assessed the Fuel Requirement in the context of the *CEPA 1999* and determined that it is a valid exercise of the Federal Government's criminal law power.[225] In the first part of its analysis, the Federal Court found that the

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219 *Syncrude Canada Ltd v Canada (Attorney General)*, 2014 FC 776, 461 FTR 53 [*Syncrude*].
220 SC 1999, c 33, s 139(1) [*CEPA 1999*].
221 *Renewable Fuels Regulations*, SOR/2010-189, s 5(2).
222 *Syncrude*, *supra* note 219 at para 9.
223 *Ibid*.
224 *Ibid* at para 13.
225 *Ibid*.

dominant purpose of the Fuel Requirement was to reduce greenhouse gas emissions.[226] While it recognized that part of the Fuel Requirement's purpose was to create a market demand for renewable fuels, it rejected Syncrude's argument that this was its dominant purpose.[227] The Federal Court also found that the effect of the Fuel Requirement was to reduce greenhouse gas emissions by requiring renewable fuels to be blended with non-renewable fuels.[228] In the second part of its analysis, the Federal Court held, based on the Supreme Court of Canada's decisions in *R. v. Hydro-Québec*,[229] and *Reference re Assisted Human Reproduction Act*,[230] that the protection of the environment is a valid criminal law purpose.[231] Furthermore, in the alternative, the Federal Court concluded that it would have also upheld the Fuel Requirement under the ancillary powers doctrine.[232]

4. COMMENTARY

This case further confirms that the Federal Government has authority under its criminal law power to regulate matters relating to the environment, with particular reference to the reduction of greenhouse gas emissions.

This decision may further set the stage for how Canadian courts might assess widespread federal regulation of greenhouse gas emissions, especially if such future legislation conflicts with or supplements existing provincial laws.

D. *DIXON V. ONTARIO (DIRECTOR, MINISTRY OF THE ENVIRONMENT)*[233]

1. BACKGROUND

This case concerns the opposition of residents to the construction and operation of proposed wind turbines in Ontario because the wind turbines were alleged to cause serious harm to human health.

2. FACTS

The Ontario Director of the Ministry of the Environment (the Director) authorized the construction and operation of three wind turbine generation farms (the Wind Farms), for which it issued renewable energy approvals under the *Environmental Protection Act*.[234] Residents located near the proposed sites of the Wind Farms (the Residents) sought review of the Director's decisions before the Environmental Review Tribunal (the Tribunal) under section 145.2.1(2)(a) of the *Environmental Protection Act* on the basis that the Wind Farms would cause serious harm to human health due to the noise of the turbines or transformers.[235]

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226 *Ibid* at para 39.
227 *Ibid* at paras 37–38.
228 *Ibid* at para 53.
229 [1997] 3 SCR 213.
230 2010 SCC 61, [2010] 3 SCR 457.
231 *Syncrude*, *supra* note 219 at paras 61–66, 77.
232 *Ibid* at para 87.
233 2014 ONSC 7404, 92 CELR (3d) 290 [*Dixon*].
234 *Ibid* at para 1; *Environmental Protection Act*, RSO 1990, c E.19.
235 *Ibid* at paras 2, 6.

The Tribunal dismissed the appeals.[236] The Residents appealed the Tribunal's decision on a number of grounds. The principal ground was that the Tribunal erred by failing to read down the test under section 145.2.1(2)(a) of the *Environmental Protection Act* regarding whether the Wind Farms would cause a "reasonable prospect of harm to human health."[237] In essence, the main argument was that the test for harm under the *Environmental Protection Act* ("serious harm") was not consistent with the test for harm under section 7 of the *Charter of Rights and Freedoms*[238] which is the "reasonable prospect of harm."[239]

3. DECISION

The Ontario Superior Court of Justice concluded that the statutory test adopted under section 145.2.1(2)(a) did not depart from the test for establishing a state violation of a person's security of the person under section 7 of the *Charter*.[240] Furthermore, it found that the statutory test did not depart from the consensus scientific view on the impact of wind turbines on human health. The Residents did not show a causal link because they did not provide professional medical opinions to diagnose alleged health complaints from the noise of the turbines or the transformers. In addition, the Tribunal had the benefit of three physicians who stated there was no reliable evidence to suggest the project would cause serious physical or other serious harm.[241]

4. COMMENTARY

Part of the significance of this case is that it recognizes that harm caused by wind turbines is largely unsupported by scientific evidence, and that the Residents could not prove a sufficient causal link to any harm they may suffer. Therefore, while scientific study continues, organizations active in wind power generation should take some comfort in this decision. However, the fact that the Residents sought to challenge the Wind Farms development on the basis of a *Charter* argument suggests that opposition to energy developments will continue to seek new and novel legal arguments.

VI. OPERATING AGREEMENTS

A. *BERNUM PETROLEUM LTD. V. BIRCH LAKE ENERGY INC.*[242]

1. BACKGROUND

Bernum involved a dispute between an operator and a non-operator and required the Court of Queen's Bench to examine when gross negligence exists in the context of operations in the oil and gas industry.

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236 *Ibid* at para 2.
237 *Ibid* at para 7.
238 *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, (UK), 1982, c 11 [*Charter*].
239 *Dixon, supra* note 233 at para 59.
240 *Ibid* at para 88.
241 *Ibid* at para 33.
242 2014 ABQB 652, 14 Alta LR (6th) 294 [*Bernum*].

2. FACTS

Bernum Petroleum Ltd. (Bernum) and Birch Lake Energy Inc. (Birch) entered into a joint operating agreement to acquire and develop certain petroleum and natural gas leases.[243] Bernum was the operator with a 60 percent working interest and Birch was a non-operator with a 40 percent working interest.[244] The parties also entered into an Area of Mutual Interest Agreement (the AMI Agreement), which incorporated the 2007 version of the Canadian Association of Petroleum Landmen Operating Procedure by reference.[245]

In late 2012, Bernum decided to drill two wells. Bernum served notices to Birch of its intention to drill.[246] Birch agreed to participate in both wells.[247] Problems arose during the drilling of the first well, which required Bernum to abandon the horizontal section.[248] A new notice was issued to Birch regarding the drilling of a new horizontal section, but Birch elected not to participate.[249]

Bernum issued two cash calls to Birch: $1,338,120 in relation to the failed first well and $193,920 in relation to the successful second.[250] Birch refused to pay, alleging that Bernum was grossly negligent in the operation of both wells and was therefore liable to Birch under the terms of the *2007 Operating Procedure*. Birch relied upon section 4.02(a) of the *2007 Operating Procedure* which states:

> The Operator … will not be liable to any of the Non-Operators for any Losses or Liabilities … except insofar as:
>
> (a) those Losses and Liabilities are a direct result of, or are directly attributable to the Gross Negligence or Wilful Misconduct of the Operator.[251]

The *2007 Operating Procedure* defines "Gross Negligence or Wilful Misconduct" as:

> [A]ny act, omission or failure to act (whether sole, joint or concurrent) by a person that was intended to cause, or was in reckless disregard of, or wanton indifference to, the harmful consequences to the safety or property of another person or to the environment which the person acting or failing to act knew (or should have known) would result from such act, omission or failure to act. However, Gross Negligence or Wilful Misconduct does not include any act, omission or failure to act insofar as it:
>
> (i) constituted mere ordinary negligence; or

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243 *Ibid* at para 2.
244 *Ibid* at para 3.
245 *Ibid* at para 4; Canadian Association of Petroleum Landmen, *2007 Operating Procedure* (Calgary: CAPL, 2007) [*2007 Operating Procedure*], online: CAPL <landman.ca/resources/forms-store/2007-capl-operating-procedure/>.
246 *Bernum*, *ibid* at paras 22, 24.
247 *Ibid* at paras 23–24.
248 *Ibid* at para 26.
249 *Ibid*.
250 *Ibid* at para 27.
251 *2007 Operating Procedure*, *supra* note 245, s 4.02(a).

> (ii) was done or omitted in accordance with the express instructions or approval of all Parties, insofar as the act, omission or failure to act otherwise constituting Gross Negligence or Wilful Misconduct was inherent in those instructions or that approval.[252]

Bernum set off Birch's 40 percent share of production from the second successful well against the amounts owing and commenced an action against Birch for the remaining outstanding amounts.[253] Birch filed a counterclaim in which it alleged, among other things, that Bernum was grossly negligent and that Birch was entitled to equitable set-off.

3. DECISION

Bernum obtained an order for summary judgment for the amount owing, but enforcement of the order was stayed pending resolution of Birch's counterclaim for equitable set-off**.** Birch appealed the order while Bernum appealed the stay. On appeal, the Alberta Court of Queen's Bench found that Bernum was not grossly negligent with respect to its operation of the first and second wells.[254]

In arriving at its decision, the Court of Queen's Bench held that the definition of gross negligence in the *2007 Operating Procedure* and the case law "all point to a degree of intentionality in the act or omission."[255] The Court of Queen's Bench also focused on the context of operations in the oil and gas industry. It noted that, due to the inherent risk of such operations, operators are afforded greater protection under the *2007 Operating Procedure* because they bear a disproportionate share of the risk.[256] Consequently, the Court of Queen's Bench found that Birch had failed to show a conscious wrongdoing or a very marked departure from the standard expected of an operator like Bernum.[257] In particular, Birch failed to lead evidence regarding industry standards and that Bernum acted contrary to those standards, while Bernum demonstrated that it complied with industry standards.[258] Moreover, the Court of Queen's Bench found that Birch was kept informed of the operations and participated in the drilling operation plan and, therefore, found that Birch had approved of the acts. As a result of this approval, the operations were not grossly negligent as per the *2007 Operating Procedure* definition of "Gross Negligence and Wilful Misconduct" which excludes actions done in accordance with "express instructions or approval."[259]

The Court of Queen's Bench also overturned the stay. It considered section 5.05(B)(d) of the *2007 Operating Procedure* which states that an operator may:

> Without limiting its other rights hereunder or otherwise held at law or in equity:
>
> (d) maintain actions against that Non-Operator for all such unpaid amounts and interest thereon on a continuing basis, as if those payment obligations were liquidated demands payable on the

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252 *Ibid*, s 1.01.
253 *Bernum*, *supra* note 242 at para 28.
254 *Ibid* at para 55.
255 *Ibid* at para 48.
256 *Ibid* at paras 46–48.
257 *Ibid* at para 51.
258 *Ibid*.
259 *Ibid* at para 52, citing *2007 Operating Procedure*, *supra* note 245, s 1.01.

> date they were due to be paid, without any right of that Non-Operator to set-off or counter-claim.[260]

The Court of Queen's Bench found that it prevented Birch from claiming equitable set-off. In particular, it noted that "[a] non-operator can pursue any number of claims against an operator involving that operator's gross negligence or wilful misconduct, but such claims cannot be raised as a means to refuse or delay payment of operating costs due and owing."[261] It also considered the tripartite test for granting a stay: (1) an arguable issue; (2) irreparable harm if the stay is not granted; and (3) the balance of convenience between the parties favours the granting of the stay.[262] The Court of Queen's Bench found that, while Birch had an arguable issue, Birch did not demonstrate that it would suffer irreparable harm.[263]

4. COMMENTARY

This case demonstrates the high evidentiary requirement that non-operators must fulfill in order to sustain a claim that an operator was grossly negligent under the *2007 Operating Procedure*. The bar is a high one, and elevated when the operator can provide evidence that the non-operator was involved in the approval of the operation in question. Should a non-operator hope to sustain a claim for gross negligence, the evidence must be close to overwhelming. Moreover, in overturning the stay granted to Birch, the Court of Queen's Bench recognized the proportionately higher level of risk that an operator takes on. The stay had been granted pending resolution of Birch's counterclaim for equitable set-off. The Court of Queen's Bench noted clause 5.05(B)(d), among others, was included in the *2007 Operating Procedure* to protect the operator from delayed payments by non-operators.

VII. STATUTORY INTERPRETATION

A. *GEOPHYSICAL SERVICE INC. V. CANADA-NOVA SCOTIA OFFSHORE PETROLEUM BOARD*[264]

1. BACKGROUND

This decision is one of the numerous actions filed in Canada and the US by Geophysical Service Inc. (GSI) against governmental bodies and private companies who accessed data collected by GSI and subsequently made available by governmental organizations in accordance with governmental regulations. In this decision, the Nova Scotia Supreme Court analyzed whether or not the federal and provincial *Nova Scotia Offshore Area Petroleum Geophysical Operations Regulations*[265] (the Regulations), which allowed access to GSI collected data, were ultra vires their governing legislation — the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*[266] and the *Canada-Nova Scotia*

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260 *2007 Operating Procedure*, *ibid*, s 5.05(B)(d).
261 *Bernum*, *supra* note 242 at para 104.
262 *Ibid* at para 108.
263 *Ibid* at para 109.
264 2014 NSSC 172, 345 NSR (2d) 1 [*GSI*].
265 SOR/95-144; NS Reg 191/95.
266 SC 1988, c 28.

Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act[267] (collectively, the *Acts*).

2. FACTS

The federal government and Nova Scotia government entered into an agreement (Accord) to coordinate efforts regarding offshore petroleum development. The governments passed the *Acts* to bring the Accord into effect. The purposes and objectives of the *Acts* and Regulations were to support the exploration, development and production of offshore petroleum resources.[268]

Under the Regulations, seismic data could be accessed by any party after an initial period of ten years in which such seismic data was held confidential. GSI challenged the Canada-Nova Scotia Offshore Petroleum Board's (Board) authority to make the Regulations under the *Acts*. GSI argued that the Board was not able to implement the Regulations regarding the collection, storage, and provision to third parties of seismic data that was collected by private companies.[269]

3. DECISION

The Nova Scotia Supreme Court stated that the "modern rule" of statutory interpretation is how courts must analyze statutes: "Today there is only one principle or approach, namely, *the words of an Act are to be read in their entire context and* in their grammatical and ordinary sense *harmoniously with the scheme of the Act, the object of the Act*, and the intention of Parliament."[270]

As well, the Nova Scotia Supreme Court set out the following guiding principles on how to determine if a delegate is making regulations outside of its authority: (1) authority delegated from statute must be exercised strictly in accordance with the enabling statute, and may not conflict with the statute; (2) the court must consider the purpose and intent of the enabling statute to determine the vires of subordinate legislation; (3) the delegation is confined by the object, purpose and terms of the enabling statute; (4) there is a presumption of validity for subordinate legislation that will only be rebutted with clear evidence; and (5) when there is doubt as to the meaning of the words, courts should prefer a construction that promotes rather than defeats the intention of the statute.[271] In order for a regulation to be intra vires its enabling statute, it must be consistent with the objective of the enabling statute or the scope of the statutory mandate.[272]

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267 SNS 1987, c 3.

268 *GSI*, *supra* note 264 at para 20.

269 *Ibid* at para 15.

270 *Ibid* at para 16 [emphasis added], citing EA Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87. See also *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42, [2002] 2 SCR 559 at para 26.

271 *GSI*, *supra* note 264 at para 18. See also *Kubel v Alberta (Minister of Justice*), 2005 ABQB 836, [2006] 8 WWR 570 at para 23.

272 *Katz Group Canada Inc v Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 SCR 810 at paras 24–30. See also *GSI*, *ibid* at para 19.

The Nova Scotia Supreme Court held that the Regulations were within the scope of authority designated by the *Act*s. The Nova Scotia Supreme Court disagreed with GSI's assertions that the *Act*s limited the Board to enact provisions that dealt with safety only. Rather, the *Act*s applied to a number of activities, including exploration, which includes seismic data gathering activities. More particularly, after reviewing definitions of seismic surveys in an article entitled "The Confidentiality of Seismic Data,"[273] and in *The Dictionary of Canadian Law*,[274] the Nova Scotia Supreme Court held "[t]here can be no question that there are different stages of exploration. That does not mean that seismic surveys are not part of that exploration, *albeit*, an early part of the process."[275] Hence, ultimately, the Nova Scotia Supreme Court found the Regulations to be intra vires and part of the overall legislative and regulatory scheme of the *Acts*.[276]

4. COMMENTARY

The Nova Scotia Supreme Court's finding that the Regulations were intra vires, and therefore valid, may impact GSI's other actions where it has alleged improper access to seismic data from regulatory boards.

This case also reinforces the statutory framework courts are to utilize when determining whether a board or other statutory delegate has the authority to make decisions. As more decisions are being made by boards and tribunals, the Nova Scotia Supreme Court's analysis of whether a board or tribunal has the requisite authority to make rules and decisions is likely to have increased applicability.

VIII. SURFACE RIGHTS

A. *PROGRESS ENERGY CANADA LTD. V. SALUSTRO*[277]

1. BACKGROUND

Salustro involved a dispute between Progress Energy Canada Ltd. (Progress) and a landowner (the Landowner) relating to the payment of rents under the British Columbia *Petroleum and Natural Gas Act*.[278] At issue was the criteria used to determine compensation for surface access.

2. FACTS

The Landowner owned several parcels of land in British Columbia on which Progress had oil and gas operations. The Landowner and Progress had previously negotiated the amount of rent that Progress would pay the Landowner for surface access, but the parties were unable

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273 Michael P Simms & Van Penick, "The Confidentiality of Seismic Data" 30:2 Dalhousie LJ 515.
274 *The Dictionary of Canadian Law*, 1st ed, *sub verbo* "geophysical exploration, geophysical operation."
275 *GSI*, *supra* note 264 at paras 27–31 [emphasis in original].
276 *Ibid* at para 33.
277 2014 BCSC 960, 2014 BCSC 960 (CanLII) [*Salustro*].
278 RSBC 1996, c 361.

to come to an agreement and the matter proceeded to arbitration before the British Columbia Surface Rights Board (the Board).[279]

Although the Board considered a number of factors under section 154(1) of the *Petroleum and Natural Gas Act*, which governs the amount of compensation payable to a landowner, it was the Board's interpretation and application of subsection 154(1)(c) ("a person's loss of a right or profit with respect to the land") and subsection 154(1)(f) ("compensation for nuisance and disturbance from the right of entry") that were the main issues in this case.[280]

The Board held that the test under subsection 154(1)(c) was whether there was "evidence of probable and reasonably foreseeable ongoing and recurring loss or damage that can be reasonably quantified."[281] The Landowner had grown hay on the lands, but had stopped in 1997 because there was "no market for hay."[282] Aerial photos indicated that the lands had not been recently used for agriculture.[283] Despite this, the Board found that there was evidence of probable and reasonably foreseeable ongoing and recurring loss or damage on the basis that the lands are "good lands" with "farm qualification."[284]

The Board held that subsection 154(1)(f) was intended to compensate landowners for "[t]angible and intangible impacts."[285] The intangible impacts noted by the Board were traffic, noise, dust, and other disturbances, and found that the Landowner should be entitled to some compensation for such intangible impacts.[286]

After considering all of the factors, the Board increased the surface rent. Progress sought judicial review of the Board's decision arguing, among other things, that the Board erred in jurisdiction and mixed fact and law by awarding compensation when there was no evidence that the Landowner intended to farm the land and for nuisance and disturbance for tangible and intangible impacts.[287] It also argued that the Board erred by reversing the onus of proof required by placing the burden on the petitioner to disprove any alleged losses.[288]

3. DECISION

The British Columbia Supreme Court concluded that the Board's decisions on the issues of: (1) whether it was reasonably probable and foreseeable that the Landowner would use the property for hay production in the future; and (2) the tangible impacts on the landowner, were unreasonable.[289] However, the British Columbia Supreme Court concluded that the Board had not erred on the issue of evidentiary onus.[290]

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279 *Salustro*, *supra* note 277 at paras 5, 9–10.
280 *Petroleum and Natural Gas Act*, *supra* note 279, ss 154(1)(c), (f); *Salustro*, *ibid* at para 13.
281 *Salustro*, *ibid* at para 16, citing *Arc Petroleum Inc v Kane Piper* (5 December 2008), 1598-2, online: BC SRB <www.surfacerightsboard.bc.ca/Documents/OilandGasOrders/Order-Final1598-2.pdf> at para 51.
282 *Salustro*, *ibid* at para 23.
283 *Ibid* at para 17.
284 *Ibid* at paras 23–24.
285 *Ibid* at para 30.
286 *Ibid* at paras 33–34.
287 *Ibid* at para 49.
288 *Ibid* at para 63.
289 *Ibid* at paras 111–14.
290 *Ibid* at para 74.

In its analysis of the first issue referenced above, the British Columbia Supreme Court noted that there is a difference between the potential for and the foreseeability of farming.[291] The British Columbia Supreme Court held that "whether farming is reasonably probable and foreseeable must surely be an objective test. The subjective intention of a landowner is a relevant factor but other evidence is required."[292] It concluded, based on the evidence of the current use of the property and the other evidence before the Board, that it was not reasonably foreseeable that the landowner would bring the property into hay production in the future.[293] Further, the British Columbia Supreme Court noted that, even if it is reasonably foreseeable that the landowner would bring the property into hay production, there would be no tangible impacts since hay production is not actually taking place.[294]

The British Columbia Supreme Court rejected Progress's argument that the Board had reversed the onus of proof under the *Petroleum and Natural Gas Act* by requiring Progress to disprove the Landowner's alleged losses.[295] The British Columbia Supreme Court held that the onus was properly on the Landowner because an award for compensation for loss of profit is also based on probable and reasonably foreseeable ongoing and recurring loss or damage.[296]

4. COMMENTARY

This decision helped to clarify how the Board will assess the reasonableness of surface rights compensation to a landowner in British Columbia.

The onus of proof to establish reasonable surface rents will be on the landowner in a hearing before the Board. Moreover, the test necessary to establish the reasonableness of surface rent will be an objective one. A landowner's loss of profits associated with surface operations of an oil and gas company must be actually quantifiable or probable, and reasonably foreseeable. The mere potential for losses to be suffered is not sufficient for compensation.

B. *SPROULE V. ALTALINK MANAGEMENT LTD.*[297]

1. BACKGROUND

This case involved an appeal by a landowner of an Alberta Surface Rights Board decision regarding the compensation he was awarded for Altalink constructing a transmission line that went through his property. The Alberta Court of Queen's Bench held that the Board's discretion is fettered by the *Surface Rights Act*,[298] and the compensation it awards cannot be based upon comparable rates a landowner might receive in the marketplace.

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291 *Ibid* at para 85.
292 *Ibid*.
293 *Ibid* at paras 87–89.
294 *Ibid* at para 94.
295 *Ibid* at paras 63, 74.
296 *Ibid* at para 66.
297 2015 ABQB 153, 2015 ABQB 153 (CanLII) [*Sproule*].
298 RSA 2000, c S-24.

2. FACTS

Altalink was building a transmission line from Pincher Creek, Alberta to Lethbridge, Alberta.[299] Altalink planned to have it pass over ten titled units of land owned by the four appellants. Altalink properly complied with the entry conditions of the *Surface Rights Act*. Therefore, the Board made right of entry orders for all ten parcels, and awarded compensation for the first year of $3,750 per acre and annual compensation of $500 per tower.[300] The appellants farmed the land, and one appellant, Lloyd Sproule (Sproule), had leased part of his property for a windfarm's wind turbines (which the transmission line was being built to support) as well as for a cell phone tower.[301] The four landowners appealed the compensation awarded.

3. DECISION

The Court of Queen's Bench examined two issues: (1) was the amount awarded by the Board too low in comparison to how much Sproule was receiving in compensation for the cell tower or wind turbines on his property, or in comparison to how much the Piikani Nation received in compensation for the same Altalink transmission line to pass over its land; and (2) was the sole highest and best use of the land wind turbine development therefore requiring a raise in the amount of compensation?[302]

The Court of Queen's Bench reviewed the law of surface rights compensation. The *Surface Rights Act* is a strict statutory scheme that requires the Board to grant access to land once certain technical requirements are met.[303] The scheme was founded on compensation rather than valuation, based on the considerations set out in the *Surface Rights Act*. The Court of Queen's Bench cited *Sandboe v. Coseka Resources Ltd.* as follows:

> The Surface Rights Board's obligation to fix compensation is not restricted. It is entitled to say that it has looked at land value and decided that it is inadequate compensation. The board is equally entitled to look at loss of income and say that it is inadequate. Thus, if the established land value is not adequate compensation in the board's view, it can substitute or add some figure derived from loss of income. The board is required to determine whether the established value is adequate compensation. If it determines that the established value is adequate, then by adding an award for loss of use is overcompensating.
>
> There is no mandate in the Act to overcompensate a surface owner. It is an error to overcompensate.[304]

In its analysis, the Court of Queen's Bench stated that it did not matter how much Sproule had received in compensation from other sources for surface land access as those surface leases were not governed by the *Surface Rights Act*. Rather, Sproule was able to go to the free market and negotiate terms outside of the statutory regime. Conversely, the Board is

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299 *Sproule*, *supra* note 297 at para 1.
300 *Ibid* at para 2.
301 *Ibid* at paras 3, 15.
302 *Ibid* at para 7.
303 *Ibid* at para 11. See also *Mueller v Montana Alberta Tie Line*, 2011 ABQB 738, 57 Alta LR (5th) 278 at paras 25, 79.
304 *Sproule*, *ibid* at para 13, citing *Sandboe v Coseka Resources Ltd* (1990), 74 Alta LR (2d) 277 (QB) at 282.

only able to consider the provisions found in the *Surface Rights Act*.[305] "Fairness" was not one of the factors the Board was able to take into consideration.[306]

As well, the amount the Piikani Nation received was irrelevant because the compensation payable to the Piikani was also not governed by the *Surface Rights Act*. The land is held in trust by the Crown for the Piikani Nation and the Crown has the ability to deny entry to the land, thus the amount payable must be negotiated unlike for freehold landowners.[307]

Finally, the Court of Queen's Bench upheld the Board's decision that there were two highest and best uses for the land, thus the Board's determination to value portions of the land based upon both wind turbine development or agricultural uses was appropriate, rather than just upon wind turbine development.[308] The Board found that wind turbine development and agricultural uses could occur simultaneously as Sproule was still running his farm. Therefore, neither use was subservient to the other.[309]

4. COMMENTARY

This case confirms that a Board award of compensation for surface rights access is dependent upon the specific situation and cannot be compared to other access agreements a landowner has in place when such other arrangements are not subject to the same statutory regime. The Board's discretion is fettered, and unless there is an overhaul to the statutory scheme, "fairness" does not play a part in the determination of compensation.

IX. ADMINISTRATIVE AND REGULATORY

A. *RATE REGULATION INITIATIVE, RE*[310]

1. BACKGROUND

This case involved the appeals of two decisions of the Alberta Utilities Commission (the Commission), which partially denied certain legal and consulting costs claimed by ATCO Gas and Pipeline Ltd. and ATCO Electric Ltd. (collectively, ATCO). The central issue concerned whether legal expenses incurred in respect of hearings unrelated to rate-setting may be recovered by utility companies from their ratepayers.

2. FACTS

ATCO was involved in two proceedings before the Commission, however neither involved rate-setting for a specific utility.[311] ATCO submitted claims for legal costs incurred in respect of those proceedings, but the Commission only awarded a portion of the total costs

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305 *Sproule*, *ibid* at paras 39–41.
306 *Ibid* at para 38.
307 *Ibid* at para 32.
308 *Ibid* at para 53.
309 *Ibid* at para 47.
310 2014 ABCA 397, [2015] 1 WWR 211 [*Rate Regulation*].
311 *Ibid* at paras 71–72.

that were claimed.[312] In doing so, the Commission rejected ATCO's argument that, in the context of these hearings, it was entitled to all of its legal costs which were "prudently incurred."[313] ATCO appealed the decisions, taking the position that the *Alberta Utilities Commission Act*[314] "does not grant the Commission any authority to award legal costs according to its own guidelines. Instead, they maintain that as regulated utilities, they have a *right* to full recovery of all their prudently incurred costs and this includes their legal costs."[315]

3. DECISION

The Alberta Court of Appeal concluded that the Commission's interpretation of the *Alberta Utilities Commission Act* was not only reasonable, it was correct. The Court of Appeal held that the Commission has the authority to decide when, and in what amount, it will award legal costs to parties appearing before it, including utility companies.[316] In its analysis, the Court of Appeal identified six reasons supporting this conclusion: (1) the *Alberta Utilities Commission Act* grants the Commission discretionary authority over costs; (2) the relevant legislation does not entitle a party to full recovery of its legal costs; (3) policy reasons support the Commission's general discretion in this regard; (4) the "regulatory compact" does not trump the statutory scheme; (5) the legal costs at issue are not legal costs incurred in rate-setting hearings; and (6) not awarding or limiting legal costs in an individual case does not negatively impact a utility company's rate of return improperly or unfairly.[317]

4. COMMENTARY

This decision is of interest to regulated utilities in Alberta and their counsel. On the facts before it, the Court of Appeal explicitly rejected the notion that all costs incurred by a regulated utility in the course of non-rate-setting hearings are recoverable, including legal fees. It remains to be seen if this decision will have broader implications going forward for regulated utilities, or if it will have limited general applicability to the specific facts at issue. It can be anticipated that regulated utilities will continue to claim all costs, including legal fees, incurred in respect of rate-setting proceedings, but whether all such costs are recoverable may now be an open question.

X. TAXATION

A. *BURLINGTON RESOURCES CANADA LTD. V. BRITISH COLUMBIA*[318]

1. BACKGROUND

The British Columbia Court of Appeal examined whether well cementing materials used by a service provider were sold as tangible personal property and, therefore, attracted PST

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312 *Ibid* at paras 44, 56.
313 *Ibid* at para 56.
314 SA 2007, CA-37.2.
315 *Rate Regulation*, *supra* note 310 at para 78 [emphasis in original].
316 *Ibid* at para 120.
317 *Ibid* at paras 80, 102, 106–107, 113, 119.
318 2015 BCCA 19, [2015] 5 WWR 33 [*Burlington*].

under the *Social Service Tax Act*,[319] or alternatively, if the materials were held by the service provider until the completion of the services, and became part of the realty upon completion of the services, thus not attracting PST.

2. FACTS

BJ Services Company Canada (BSCC) provided well cementing services to Burlington Resources Canada Ltd. (Burlington).[320] The Crown issued assessments to Burlington on the basis that the materials used in the cementing process by BSCC were sold as tangible personal property to Burlington, and therefore attracted PST under the *Social Service Tax Act*.[321] Upon appeal by Burlington to the British Columbia Supreme Court, the assessments were set aside.[322] In its analysis, the British Columbia Supreme Court considered whether the agreement between BSCC and Burlington was a service contract or a time and materials contract. The key contractual provisions summarized by the British Columbia Supreme Court indicate the following: (1) the risk of loss remained with BSCC until Burlington signed documentation acknowledging the work was completed, at which point title passed; (2) BSCC had control over the worksite; and (3) the services are specified as stimulation and cementing services with pricing discounts.[323] The British Columbia Supreme Court also found that Burlington and BSCC only considered the total cost and revenue, respectively, and did not concern themselves with the materials and services.[324]

The British Columbia Supreme Court also addressed the Crown's argument that there was a large-scale transfer of property for economic consideration in accordance with section 5(1) of the *Social Service Tax Act*.[325] However, this argument was rejected on the following basis:

> The title to the materials which became affixed to the real property passed to the owner of the real property, in this case the Crown who owns the lands, by accession. At the point in time when the materials became incorporated into the realty, they ceased to be [tangible personal property].
>
> With regard to the materials that come out of the well bore, they have no use and must be disposed of. In the case of the cement slurry returns, they are necessary to the provision of the service in order that it can be determined that the cement has been pumped to the bottom of the well bore and then up through the annulus to the top of the annulus.[326]

As a result, the British Columbia Supreme Court held that that assessment was not valid and allowed the appeal.[327] The Crown appealed the decision to the Court of Appeal.

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319 RSBC 1996, c 431.
320 *Burlington, supra* note 318 at para 3.
321 *Ibid* at para 4.
322 *Ibid* at para 7.
323 *Ibid* at para 14.
324 *Ibid* at para 15.
325 *Ibid* at para 26.
326 *Ibid* at para 28.
327 *Ibid* at para 31.

3. DECISION

The Court of Appeal dismissed the appeal. It held that the assessments could not stand because the materials did not pass to Burlington before they lost their character as tangible personal property and became part of the realty.[328] The Court of Appeal concluded that the trial judge had not erred when she held that the contract between BSCC and Burlington was a service contract and not a time and material contract.[329]

4. COMMENTARY

This case demonstrates that careful consideration should be given to the drafting of contracts in order to avoid unintended tax consequences. There are a number of factors that courts will consider when assessing whether a contract is primarily a service contract or a time and materials contract. In this case, the Court of Appeal considered who bore the risk, when title transferred, the nature of the industry, and the characterization of the terms of the contract.

It is interesting to compare this case to *Husky Oil Operations Ltd. v. Saskatchewan (Minister of Finance)*,[330] which was commented on in last year's edition of this article.[331] In that case, the Saskatchewan Court of Queen's Bench found that a contract between Husky Oil Operations Ltd. (Husky) and a third party service provider (well cementing) was for the sale of materials and that Husky was the end user of the materials, which resulted in PST. The Saskatchewan Court of Queen's Bench distinguished the case from the earlier trial decision in *Burlington* on the basis that, in *Burlington*, the supply of cement was incidental to a service contract.[332] With the continued development of two competing lines of cases, the facts and the particular wording of such contracts remains important.

XI. BUILDERS' LIENS

A. *PROPAK SYSTEMS LTD. V. GREY OWL ENGINEERING LTD.*[333]

1. BACKGROUND

The Saskatchewan Court of Queen's Bench examined whether the statutory definition of an "improvement" on the land under the Saskatchewan *Builders' Lien Act*[334] was to be interpreted as expansive or exhaustive and restrictive.

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328 *Ibid* at para 57.
329 *Ibid* at paras 51–52.
330 2014 SKQB 116, 443 Sask R 172.
331 Sonya Morgan, Michael J Donaldson & Robert Wood, "Recent Judicial Developments of Interest to Energy Lawyers" (2014) 52:2 Alta L Rev 417 at 450.
332 *Ibid* at 451.
333 2015 SKQB 43, 42 CLR (4th) 217 [*Propak*].
334 *The Builders' Lien Act*, SS 1984-85-86, c B-7.1 [*BLA*].

2. FACTS

Propak Systems Ltd. (Propak) was an engineering and fabrication company, who contracted with BlackPearl Resources Inc. (BlackPearl) to provide engineering services regarding a plot of land leased by BlackPearl for the extraction of minerals. Propak retained Advanced Metal Concepts & Fabrication Ltd. (Advanced Metal) to build three storage tanks for use on the land leased by BlackPearl. Advance Metal, in turn, retained Grey Owl Engineering Ltd. (Grey Owl) to provide engineering services in regard to the fabrication of tanks. Advanced Metal abandoned the contract before building the tanks, but Grey Owl had already completed its work under the contract. Grey Owl then registered a lien against the land in regards to its work on the tanks.[335]

3. DECISION

In order to determine if the caveat was valid, the Court of Queen's Bench looked at two issues: (1) whether the meaning of "improvement" under the *BLA* was expansive or exhaustive and restrictive; and (2) what the parties' intentions for the tanks were if the meaning was exhaustive and restrictive.[336]

The Court of Queen's Bench examined the different language regarding what constitutes an "improvement" under Saskatchewan, Alberta, New Brunswick, British Columbia, and Ontario legislation regarding liens.[337] The British Columbia legislation had been characterized as inclusive, which suggests courts rule non-affixed structures as improvements because the legislation does not have a specific exception to the definition. Conversely, Alberta, Ontario, and New Brunswick's legislation had been characterized as exhaustive because they have exceptions to what an "improvement" is.[338]

The Saskatchewan definition has an exception identical to that in the Alberta legislation, and states that "'improvement' means … *except a thing that is not affixed to the land or intended to become part of the land*."[339] Therefore, the definition must be read as exhaustive and restrictive.[340]

The parties' intentions for the tanks was considered next. Affidavit evidence indicated that the tanks were specifically designed for Propak, but they were able to be relocated. The Court of Queen's Bench commented that "[t]he threshold seems to be that as long as the object is capable of being moved, it indicates intention not to be affixed."[341] Therefore, the intention was not for them to become permanently fixed. As such, they were not an improvement.[342] Given that the tanks were not an improvement, the lien was not valid.

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335 *Propak*, *supra* note 333 at para 1.
336 *Ibid* at para 6.
337 *Ibid* at para 8.
338 *Ibid* at para 9.
339 *Ibid* at para 8, citing *BLA*, *supra* note 334, s 2(1)(h) [emphasis added].
340 *Ibid* at paras 9–10.
341 *Ibid* at para 14.
342 *Ibid* at para 15.

4. COMMENTARY

With the exception of British Columbia, the permanency of a fixture must be considered when determining if a lien is valid. If a structure is capable of being moved, it is unlikely the courts will consider it to be an improvement under the Saskatchewan *BLA* and those provinces with comparable builders' lien legislation.

B. *TERVITA CORP. V. CONCREATE USL (GP) INC.*[343]

1. BACKGROUND

This case examined the validity of a second builders' lien that was filed when a first one lapsed after a company did not file a certificate of *lis pendens* (CLP) in time.

2. FACTS

Tervita Corporation (Tervita) performed work on ConCreate USL (GP) Inc.'s (ConCreate) property. ConCreate went into receivership and the receiver blocked Tervita's access to the site in April 2012. Tervita filed a lien in April 2012 and then continued talks with the City of Calgary (as the landowner), about finishing the work. Tervita discovered in July 2012 that it would not be permitted to complete the work. Tervita failed to file a CLP in regards to the lien within the 180 days required by the Alberta *Builders' Lien Act*.[344] Right after the first lien expired because the CLP was not filed, Tervita filed a second, identical lien for the same work.[345] The Alberta Court of Queen's Bench removed the second lien because it held that a party could not file two liens on the same subject matter. Tervita appealed this decision.

3. DECISION

The Alberta Court of Appeal reviewed the scheme of the *Builders' Lien Act* and noted that, due to the priority a lienholder has over other creditors, there are strict rules about the registration and enforcement of a lien. The Court of Appeal stated: "It is well established that a liberal approach may be taken to determining the scope of the lien right, but a strict interpretation is placed on the procedure that is required to enforce a lien."[346]

In order to determine if the second lien was valid, the Court of Appeal considered two issues: (1) was Tervita out of time to file the second lien; and (2) is it possible to file two liens on the same subject matter?

To decide whether or not Tervita was out of time to file the second lien, the Court of Appeal examined when the contract was abandoned. Accordingly, when the receiver locked Tervita out or when the City of Calgary confirmed the contract was at an end. The Court of Appeal said that while Tervita did not personally "abandon" the contract, it knew or should have known that the other party (ConCreate) would not complete the contract. By applying

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343 2015 ABCA 80, 2015 ABCA 80 (CanLII) [*ConCreate*].
344 RSA 2000, c B-7.
345 *ConCreate*, *supra* note 343 at para 2.
346 *Ibid* at para 5.

an objective test of "[o]nce it [became] impractical or impossible to perform the contract, no reasonable party would persist in saying they are 'ready willing and able' to continue performing."[347] The Court of Appeal held that the contract was abandoned when the receiver blocked Tervita's access to the work site; therefore, Tervita had 45 days to file a lien under the *Builders' Lien Act* after its access was blocked by the receiver.[348] It filed the second lien after the expiration of 45 days, so the lien was invalid.

Finally, the Court of Appeal examined whether or not the second lien would have been valid if it had been filed in time by looking at the language of the *Builders' Lien Act* in that there is a difference between a "lienholder" and a "registered lienholder":

> Section 46 states that registration has the effect of "continuing" a lien. Section 48(5) provides that if a registered lienholder does not prove its lien after notice is given, it "loses the lienholder's lien". Section 50 provides that multiple liens can be enforced through the same statement of claim, and s. 43(2) confirms that any sheltered registered lienholder can file the necessary *lis pendens*. It seems logical that the failure of the lienholder who issued a statement of claim to file the necessary *lis pendens* would not prevent other "sheltered" lienholders from enforcing their claims independently, so long as they did so within the necessary timelines. For example, if the issuing lien holder settled its claim, and thus failed to file a *lis pendens* because it had lost interest in the action, that would not prejudice other lienholders. If the failure to file the *lis pendens* does end the "lien rights" of the issuing lienholder, it presumably does not have that effect on the "lien rights" of any other lienholder. These provisions all demonstrate a subtle difference between the "lien rights" and the "statement of lien" that is registered at the Land Titles Office.[349]

The Court of Appeal concluded that *Builders' Lien Act* does not prevent parties from filing multiple liens for the same work, as long as the strict timelines of the different steps are followed, and this supports the liberal approach that is to be taken in determining whether a claimant has lien rights.[350]

4. COMMENTARY

The Court of Appeal held that a company may file multiple liens for the same work as long as the strict timelines set out in the *Builders' Lien Act* are met. Awareness of timelines is key because such a lien is valid as long as a lienholder follows the statutory timelines and has a justifiable claim to the lien filed.

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347 *Ibid* at paras 12, 16 [citations omitted].
348 *Ibid* at para 15.
349 *Ibid* at para 23.
350 *Ibid* at paras 24–26.

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