Top commercial decisions of 2022

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2022 was a significant year for commercial decisions. These cases all represent important decisions and key takeaways for corporations. BLG lawyers contributed to many notable cases and decisions. Our commercial litigators are the experts here to help you understand the impact these decisions could have on your business in 2023 and beyond. From a significant arbitration case to commercial contracts and international commercial decisions, our team of experienced commercial litigators monitor these decisions to keep clients informed of key developments.

Federal court endorses competence-competence principle: *General Entertainment and Music Inc. v. Gold Line Telemanagement Inc*.,2022 FC 418

(Pierre N. Gemson and Glenn Gibson)

Introduction

In *General Entertainment and Music Inc. v. Gold Line Telemanagement Inc*., 2022 FC 418, the Federal Court provided guidance on the legal test that applies when a party seeks to enforce an arbitration clause. This decision is notable because arbitration related matters are much less common in the Federal Court than the provincial courts, and it provides guidance to parties on the applicable framework where a party is seeking a stay.

What you need to know

- Gold Line Telemanagement Inc. **(**Gold Line**)** appealed a decision of an Associate Judge dismissing its motion to stay in favor of arbitration General Entertainment and Music Inc's (GEM) action for copyright infringement.
- The primary issue before the court was whether the proceedings could be stayed in favour of arbitration in Bermuda.

- The Federal Court allowed the appeal. The case management judge's refusal to stay the proceedings in favour of arbitration was based on an incorrect error of law.

Background

GEM, incorporated in Canada in 2015, broadcasted television programs in the Farsi language to customers through subscription satellite services. GEM owned the copyright of the programs. Until 2017, the GEM group of companies were operated primarily through an entity called GEMCO, which was the predecessor-in-title to certain assets now owned by GEM. GEM asserted that it was not the corporate successor of GEMCO and it that had not assumed GEMCO's contractual obligations.

Under the Content Acquisition and Licensing Agreement (Agreement), the Licensor, GEM, gave Ava, a contracting entity based in Bermuda that sourced content for Gold Line, its parent company, the right to offer its content. Gold Line provided some of their over-the-top media services through GLWiZ, which was a global IP platform owned and run by GLWiZ Inc, a subsidiary of Gold Line. The Agreement contained an arbitration clause that describes "General Entertainment Media", but did not specify whether it was referring GEMCO, the GEM group of companies generally, or another entity.

The applicable test to stay proceedings in favour of arbitration

The primary issue before the court was whether the Federal Court proceeding could be stayed in favour of arbitration in Bermuda.

While there is a federal *Commercial Arbitration Act* (the CAA), its scope is narrower than the Federal Court's subject matter jurisdiction. The CAA applies only to actions involving the federal Crown, and maritime and admiralty law matters. It does not apply to other claims that can be brought in the Federal Court, such as claims under intellectual property statutes.

Without directly acknowledging the scope of the CCA, the Court referred to the *United Nations Foreign Arbitral Awards Convention Act*, RSC 1985, c 16 (UNFAACA) which incorporates into Canadian law the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). The Court confirmed that Article II.3 of the New York Convention requires the Court to refer the matter to arbitration unless they found that the arbitration agreement was "null and void, inoperative or incapable of being performed."

The Court held so long as the "the dispute potentially falls within the arbitration clause; it must be referred to arbitration." This is consistent with the competence-competence principle and leading Supreme Court of Canada jurisprudence, including *Dell Computer Corp v Union des consommateurs*, 2007 SCC 34, which has consistently confirmed that arbitrators are competent to their own jurisdiction.

When an arbitration clause exists, the Federal Court held that any challenges to the jurisdiction of the arbitrator must first be referred to the arbitrator, subject to two exceptions:

i. when the challenge to the arbitrator's jurisdiction concerns a question of law alone, or
ii. when there is a question of mixed law and fact, the question of fact only entails a superficial examination of the documentary proof in record and the challenge is not a delaying tactic or prejudice to the recourse of arbitration.

The Federal Court also clarified that the case management judge erred in relying on the Supreme Court of Canada's decision in *Z.I. Pompey Industrie v ECU-Line N.V.,* 2003 SCC 27 when deciding whether to enforce the arbitration clause. That case holds that where a forum selection clause binds the parties, a court must enforce it unless the plaintiff can show sufficiently "strong cause" to support the conclusion that it would not be reasonable or just in the circumstances to require the plaintiff to adhere to the terms of the clause. Unlike a forum selection clause case, where there is a valid arbitration agreement, the court has no discretion not to stay the proceedings.

A party cannot escape arbitration by alleging termination of the contract

The Federal Court also confirmed that a party cannot escape arbitration by alleging termination of the contract containing the arbitration clause. The doctrine of separability considers an arbitration clause to be "autonomous and juridically independent from the main contract in which it is contained". The Court held that even if the Agreement had been validly terminated, it would not detract from the Court's duty to systematically refer the parties to arbitration.

Key takeaways

This decision makes clear that a stay of proceedings in favour of arbitration is mandatory in Federal Court even if the CAA does not apply. Further, a party cannot escape arbitration by alleging termination of the contract containing the arbitration clause. This decision is under appeal although a hearing of the appeal has not been scheduled at the time of this writing.

Federal Court partially stays class action in favour of arbitration: *Difederico v. Amazon.Com, Inc.*, 2022 FC 1256

(Pierre N. Gemson and Glenn Gibson)

Introduction

In *Difederico v. Amazon.Com, Inc*., 2022 FC 1256, the Federal Court granted a motion by Amazon (defined below) to stay in favour of arbitration certain claims of a class actions representative plaintiffs under section 45 of the *Competition Act,* RSC 1985, c C-34 that are covered by an arbitration clause. This decision is notable for three reasons. First, it is one of a small number of decisions by the Federal Court that has considered the enforceability of an arbitration clause in the context of a class action. Second, the judgement interpreted the meaning of "commercial legal relationship" within the meaning of the UNFAACA. Third, it is the first decision of the Federal Court to consider the exception to competence-competence principle. This decision is articulated by the Supreme Court of Canada in *Uber Technologies Inc v. Heller*, 2020 SCC 16, that a *bona fide* challenge to arbitral jurisdiction can be decided by a court rather than being referred to the arbitrator if referral would make it impossible for a party to arbitrate or for the challenge to be resolved. Third, it is the first decision of the Federal Court to consider the exception to competence-competence principle articulated by the Supreme Court of Canada in *Uber Technologies Inc v. Heller*, 2020 SCC 16, that a *bona fide* challenge to arbitral jurisdiction can be decided by a court rather than being referred to the arbitrator if referral would make it impossible for a party to arbitrate or for the challenge to be resolved.

BLG (Subrata Bhattacharjee, Caitlin Sainsbury, Pierre N. Gemson) acted for the Amazon defendants.

What you need to know

- The proposed class action alleges that certain competitive pricing provisions in Amazon's agreements with third-party sellers in its stores constitute a criminal price fixing agreement contrary to section 45 of the *Competition Act.* The claim alleged over $12 billion in damages on behalf of classes who purchased products that were allegedly subject to price-fixing on the Amazon.ca, Amazon.com (defined below) and other e-commerce stores.
- The defendants moved to stay claims for purchases in Amazon's stores in favour of arbitration. As decided, the motion covered on representative plaintiff's claims for purchases on Amazon.ca because an arbitration clause applicable to purchases on Amazon.com was removed before the motion was decided.
- The Federal Court granted the stay and referred the representative plaintiffs' proposed claims for purchases on Amazon.ca to arbitration.

Background

The representative plaintiff, Ms. Difederico, filed the proposed class action against Amazon.com, Inc, (Amazon.com) Amazon.com.ca, Inc, (Amazon.ca), Amazon.com Services LLC, Amazon Services International, Inc, and Amazon Services Contracts, Inc (collectively, Amazon). Ms. Difederico had accounts with Amazon.ca and Amazon.com and purchased products through each of these accounts. In 2016, she created her account on Amazon.ca and by June 23, 2021 had placed over 285 orders with Amazon.ca for various products. Ms. Difederico continued to place orders after the underlying action was commenced and the stay motion was filed.

The arbitration clause for Amazon.com was removed in May 2021. Accordingly, Amazon amended its motion and requested to stay only Ms. Difederico's proposed claims relating to her purchases on Amazon.ca.

The Amazon.ca Conditions of Use, which are accepted by everyone who creates an Amazon account and every time anyone places an order on Amazon, included an arbitration clause that provided "[a]ny dispute or claim relating in any way to your use of any Amazon.ca Service, or to any products or services sold or distributed by Amazon.ca or through Amazon.ca Services will be resolved by binding arbitration, rather than in court."

The UNFAACA applies

A threshold issue on the motion was whether the Plaintiff's claims were "differences arising out of commercial legal relationships" within the meaning of subsection 4(1) of the UNFAACA to which the New York Convention applies. There is no definition of "commercial legal relationship" in the UNFAACA or the New York Convention.

The representative plaintiff asserted that the relationship was not commercial because "when consumers purchase goods on Amazon, they are buying goods for consumption." By contrast, Amazon argued that the ordinary and legal meaning of the term commercial relationship and the legislative intention underlying the enactment of the UNFAACA supported an interpretation that the relationship between Amazon and Ms. Difederico falls within the UNFAACA.

The motion judge held that the parties' relationship and dispute was commercial and the UNFAACA and the principle of competence-competence applied in this case such that the court had no discretion to decline to stay the claim in favour of arbitration. This conclusion was based on an interpretation of the text and purpose of the UNFAACA, the intention of the legislature when incorporating the New York Convention into the UNFAACA, and the evidence before the Court of the parties' relationship and the nature of their dispute.

The arbitration clause is not unconscionable

The motion judge determined there could be no "serious debate" that an arbitration agreement was in place and that the dispute fell within the scope of the agreement. Next, the motion judge analysed whether an exception applied to the principle of competence-competence, which requires challenges to arbitral jurisdiction to be determined first by the arbitrator.

The representative plaintiff sought t resist enforcement of the arbitration agreement, arguing that: (1) that the choice of law clause in the Amazon Conditions of Use would prevent an arbitrator from applying the *Competition Act*; (2) that the costs of arbitrating would be prohibitive; and (3) that the arbitration agreements were contrary to public policy and unconscionable. The motion judge rejected all three arguments by applying the framework set out by the Supreme Court in *Uber Technologies Inc. v. Heller*, 2020 SCC 16.

Key takeaways

This decision is consistent with other jurisprudence that suggests that Canada is an arbitration friendly jurisdiction that supports the enforcement of arbitration clauses other than in exceptional and narrow circumstances.

This case is at the forefront of determining the meaning of "commercial legal relationship" under the UNFAACA. The Federal Court's decision is under appeal, but a hearing of the appeal has not been scheduled at the time of this writing.

Novel duties of care: *McDonald v Toronto-Dominion Bank*, 2022 ONCA 788

(Kirsten Crain and Bethany Keeshan)

A tight knit circle of fraudsters in an offshore bank, SIB, perpetrated the second largest Ponzi scheme in history. In the wake of this discovery, SIB's liquidators went into action. In their efforts to recover funds, they sued TD, who had provided banking services to SIB. The plaintiffs were unsuccessful at trial and on appeal. The Ontario Court of Appeal found that TD did not owe a duty of care to SIB. This decision reminds us that the courts will not easily gloss over the proximity analysis in negligence cases involving pure economic loss. Proximity is not established by simply demonstrating that the identity of the parties falls in an established or analogous category (in this case bank and client). Courts will examine the nature of relationship including the scope of services provided in the proximity analysis.

What you need to know

- TD was the correspondent bank for Stanford International Bank Ltd. (SIB), an organization that defrauded its investors of over $7 billion. The primary perpetrator, Robert Stanford, is currently serving a 110-year prison sentence in the United States.
- The plaintiffs, SIB's joint liquidators, sued TD for its involvement in receiving and disbursing funds, alleging (a) knowing assistance in breach of fiduciary duty and (b) negligent provision of services. The Superior Court of Justice dismissed the claim, and the plaintiffs appealed the dismissal of the negligence action only.
- The Ontario Court of Appeal held that TD did not have a duty of care to SIB in these circumstances. While banks owe a duty of care to their customers in some contexts, courts will not interpret existing categories broadly. In the proximity analysis—especially in the context of pure economic loss—the court will consider whether the defendant made an undertaking to the plaintiff and whether the plaintiff relied on it. In this case, the Court found no undertaking by TD to monitor for fraud, and thus found insufficient proximity.

Background

Through the sale of certificates of deposit and an offshore Antiguan bank, Robert Stanford orchestrated a $7 billion Ponzi scheme that remained undiscovered by SIB customers, virtually all SIB employees, and government regulators until the 2008 financial crisis. Essentially, SIB fraudulently reported high investment returns, and used incoming funds from new customers to pay out redemption requests from existing customers.

As SIB's correspondent bank, TD played a critical (but unwitting) role in the fraud. The trial judge's findings about the scope of services were critical to the court's proximity analysis. The services here were "correspondent banking." This is the provision of services from one bank to another to facilitate the movement of funds, exchange of currencies, and settlement of obligations. In this case, TD acted as SIB's agent in receiving and disbursing funds to purchasers of the certificates of deposit.

In the aftermath of the discovery of the fraud, SIB's joint liquidators commenced an action against TD, claiming (a) knowing assistance in breach of fiduciary duty and (b) negligent provision of services. The trial judge dismissed the action in its entirety. Regarding the knowing assistance claim, the trial judge found that TD had no actual knowledge of the fraud and no reason to suspect it. As for negligent provision of services, the trial judge found that there was insufficient proximity to find that there was a duty of care. In the alternative, the plaintiffs failed to prove a breach of the standard of care.

The plaintiffs appealed the dismissal of the negligence claim only.

The relationship between TD and SIB does not fall under a recognized category

To establish a duty of care, one must satisfy the two-step Anns/Cooper test. At the first stage, a prima facie duty of care will be established if there is sufficient proximity and foreseeability. In cases of negligent provision of services, proximity is considered first, as foreseeability will depend on the scope of the relationship. At the second stage, the court considers any public policy considerations that may negate the prima facie duty.

If the relationship falls under a recognized duty of care category, then the Court will not need to conduct a full proximity analysis and, if the injury was reasonably foreseeable, the first stage will be satisfied. Public policy considerations are not usually considered when courts finds that the relationship between the parties falls within an existing category—since the duty of care stems from a prior decision, public policy would have been considered and the rule of precedent applies.

In McDonald, the plaintiffs argued that the relationship between TD and SIB fell under an existing category, namely the relationship between a bank and its customer in the provision of banking services. The Court rejected this argument. First, the Court held that existing categories should not be interpreted broadly, especially in the context of pure economic loss. As stated above, recognizing an existing category means that the Court would likely not consider public policy considerations under the second branch of the Anns/Cooper test.

Further, the Court acknowledged that some categories are related to one aspect of a relationship and are limited in scope or created for a specific purpose. Citing *1688782 Ontario Inc v Maple Leaf Foods Inc* (Maple Leaf), the Court confirmed that plaintiffs must establish an analogous relationship and analogous circumstances before courts will apply an existing category.

In this case, the Court agreed with the trial judge that the relationship here did not fall under existing categories involving banks. The Court emphasized that banks provide an "extremely broad range of different activities for very different purposes" and that "banks and their customers are not engaged in a one-size-fits-all relationship."

Since no existing category was applicable, the Court conducted a full duty of care analysis.

Proximity is essential to the duty of care analysis

The Court echoed the analyses in *Deloitte & Touche v Livent Inc (Livent)* and Maple Leaf, two Supreme Court decisions considering duty of care in the context of pure economic loss. Livent and Maple Leaf placed an emphasis on proximity rather than foreseeability and held that courts should consider proximity first. In the context of negligent provisions of services resulting in a pure economic loss, proximity requires that: (1) the defendant made an undertaking, and (2) the plaintiff relied on that undertaking to its detriment.

In this case, the trial judge found that TD undertook to provide correspondent banking services by transferring funds between SIB and its customers. TD did not undertake to monitor SIB to prevent insider fraud, especially where there were no clear indicia of fraud. The Court stated that TD was simply a bank, and did not undertake the responsibilities of a regulator, auditor, or insurer. As the Court succinctly concluded: "it is simply not believable that SIB detrimentally relied on TD to effectively protect SIB from itself."

The plaintiffs argued that this analysis incorrectly incorporated a discussion of the standard of care, *i.e.*, the content of the duty of care, especially when the trial judge considered whether indicia of fraud were present. However, the Court found that the trial judge did not err by considering the factual matrix, because different facts may result in different analyses. The trial judge's approach was consistent with the jurisprudence, which confirms that duty of care is "not a duty to do anything specific; it is a duty to take reasonable care to avoid causing foreseeable harm." In contrast, the standard of care is the conduct required to satisfy that duty.

Further, the Court agreed that TD's standard of care would have been met had a duty of care been established.

Key takeaways

In Livent and Maple Leaf, the Supreme Court introduced the idea that "undertakings" and "reliance" define the scope of a duty of care in the context of pure economic loss—elements which were already present in U.K. and U.S. law. McDonald illustrates how the Court will apply this reasoning. The decision in McDonald is consistent with a

trend in which the courts limit the availability of compensation for pure economic loss cases involving the delivery of services.

McDonald carries important consequences for pure economic loss generally and the financial sector specifically. Banks, trusts, investment vehicles, and other financial institutions offer a wide variety of services. To establish a duty of care, plaintiffs will need to examine the circumstances in each case and demonstrate both the defendant's undertaking and a corresponding detrimental reliance.

Force Majeure and COVID-19: *Porter Airlines Inc. v Nieuport Aviation Infrastructure Partners GP*

(Laura M. Wagner and Shereen Khalfan)

Introduction

With any commercial contract, there is the possibility that extreme, unexpected, and unavoidable events could arise that would impact a party's ability to perform its obligations under the contract. To address this possibility, many commercial contracts include a "force majeure" clause, whereby the parties allocate the risk of an extreme event, such as an earthquake, a war, or a labour disruption, by excusing the affected party's performance throughout the event.

In *Porter Airlines Inc. v Nieuport Aviation Infrastructure Partners GP*, Justice Cavanagh of the Ontario Superior Court of Justice rejected Porter Airlines Inc.'s (Porter) reliance on a force majeure clause in its contract with Nieuport Aviation Infrastructure Partners GP (Nieuport) to avoid paying monthly terminal fees while its operations were suspended during the COVID-19 pandemic. The case serves as a reminder that the fact that a contractual obligation has become more expensive or commercially unreasonable to perform is not grounds for relief under force majeure.

What you need to know

- In March 2020, Porter suspended its operations in support of ongoing public health efforts to contain COVID-19 and in response to the corresponding collapse in demand for airline travel. Porter claimed that the COVID-19 pandemic constituted a force majeure event and ceased paying monthly Terminal Fees to Nieuport from March 2020 to September 2021 when Porter recommenced operations at Billy Bishop Airport.
- On October 19, 2022, Justice Peter Cavanagh of the Ontario Superior Court of Justice found that Porter was not entitled to relief from its contractual obligations as a result of the COVID-19 pandemic and ordered Porter to pay $130M in damages to Nieuport for unpaid fees.
- The Court held that while Porter was economically affected by the pandemic, it was not "restricted" in fulfilling its payment obligations under the contract – its decision to suspend operations was driven by commercial considerations.

Background

In 2015, Nieuport acquired the passenger terminal at Billy Bishop Toronto City Airport (the Terminal) where Porter is based. Nieuport and Porter entered into a Licence Agreement by which Porter agreed to pay certain fees to Nieuport, including monthly fees for the use of the Terminal (Terminal Fees), in exchange for certain privileges, including the right to operate an air carrier business at the Terminal. A key factor in the calculation of Porter's monthly fees was the number of daily slots (for takeoff times) allocated to the airline.

In December 2018, Porter gave notice to Nieuport that it would reduce its daily slot allocation at Billy Bishop effective Jan. 2020 as a cost-saving initiative. Porter issued several additional slot relinquishment notices over the next year. Nieuport disputed the effectiveness of Porter's slot relinquishment notices and maintained that Porter would continue to be responsible to pay the Terminal Fee for its original 172 slots throughout 2020.

Then on March 18, 2020, Porter publicly announced the suspension of its operations, effective March 20, 2020, in support of ongoing public health efforts to contain COVID-19, and in the context of a precipitous decline demand for airline travel. Porter then advised Nieuport of its position that the COVID-19 pandemic constituted a force majeure event under the terms of the Licence Agreement. Although Nieuport disputed that COVID-19 was a force majeure event, Porter ceased paying monthly Terminal Fees to Nieuport from March 1, 2020 to Sept.8, 2021 when Porter recommenced operations at Billy Bishop Airport.

Porter commenced an action against Nieuport and Nieuport commenced an application against Porter. Porter's action and Nieuport's application proceeded together at a hybrid trial before Justice Cavanaugh on the Commercial List over the course of four weeks in late 2021 and early 2022.

Ontario Superior Court of Justice decision

On Oct. 19, 2022, Justice Cavanagh released a 99-page decision in favour of Nieuport. There were several contractual issues in dispute between the parties, but the main issues were (1) the basis on which Porter is required to pay monthly Terminal Fees under its Licence Agreement with Nieuport; and (2) the impact of the COVID-19 public health crisis on the parties' contractual rights and obligations under the Licence Agreement.

The slot allocation issue

One of the main issues in dispute between the parties was the basis on which to calculate Porter's monthly Terminal Fees. A key input for the calculation of Terminal Fees under the Licence Agreement is the "Carrier's Allocation", a defined term which means the number of "daily slots" allocated to Porter by PortsToronto, the owner and regulator of Billy Bishop.

Nieuport argued that “Carrier’s Allocation” should be interpreted to mean a fixed, whole, number of “daily slots”. Porter’s position was that the “Carrier’s Allocation” can be a fractional number that may vary from day to day and expressed on an average per day basis. Each side tendered evidence from fact witnesses and experts in support of their interpretation.

Cavanagh J. applied the principles of contractual interpretation set out by the Supreme Court in Creston Moly Corp. v. Sattva Capital Corp., considering the words of the agreement and the extensive evidence of surrounding circumstances tendered by both parties, and agreed with Nieuport’s interpretation. Porter is required to pay terminal fees based on a constant number of daily slots that recur during a calendar year and are reserved for Porter’s use. Because he found the Licence Agreement was not ambiguous, he held that evidence of the parties’ subsequent conduct was inadmissible per the Court of Appeal’s decision in Shewchuck v. Blackmont Capital Inc.

Justice Cavanagh also found that Porter was required to apply to PortsToronto for a reduced number of daily slots. Since Porter had not done so, no reduction had been made. Porter was therefore required to pay monthly Terminal Fees based on its full slot allocation.

The COVID-19 issues

Porter advanced two theories for why it was entitled to relief because of the COVID-19 pandemic:

1. Porter argued that the pandemic engaged the force majeure clause in the License Agreement, and thereby relieved Porter from its obligations (i) to pay Terminal Fees; and (ii) to provide notice of its intention to reduce its number of terminal slots; and
2. Porter argued that the License Agreement requires Nieuport to act reasonably in the exercise of its contractual rights, and that it was unreasonable for Nieuport to demand payment of the Terminal Fees and to increase the Terminal Fees during the pandemic. In the alternative, Porter argued it was unreasonable for Nieuport to demand payment of full Terminal Fees while Porter’s operations were suspended.

The Force Majeure clause

Porter relied on the following clause in the License Agreement as a basis to relieve its obligations to pay fees and provide notice during the pandemic:

5.1 Force Majeure

(a) Whenever and to the extent that either party is bona fide unable to fulfil or is delayed or restricted in fulfilling any of its obligations under this Licence Agreement by an event of Force Majeure, such party shall be relieved from the fulfilment of part of its obligations affected by Force Majeure for the duration of such event of Force Majeure.

(b) Notwithstanding an event of Force Majeure, the party affected shall proceed with the performance of its obligations not thereby affected.

The Court noted that Porter had the burden of proving that it fell squarely within the force majeure clause, and that whether such a clause is triggered depends on the particular words of the clause at issue. In this case, the question was whether Porter was unable or was delayed or restricted in fulfilling its obligations to (1) pay monthly Terminal Fees and (2) provide 12 months' notice of a reduction in its number of slots by the pandemic or the government's response to it. Porter argued that it was "restricted" in its ability to pay Terminal Fees because it was not earning any revenue from which to pay them, and that it was "restricted" in its ability to provide notice because it could not accurately forecast demand for services amid the pandemic.

The Court started by reviewing the evidence of the impact of the COVID-19 pandemic. The Court accepted the expert evidence of the "stark impact" of COVID-19 on the economics of the airline industry, and that business travel – Porter's mainstay – was particularly hard hit and expected to be slowest to recover. The Court rejected, however, Porter's submission that it was unable to operate during the pandemic, finding instead that Porter's decision to suspend its operations was a choice it made driven by commercial considerations.

The Court cited Dickson J. in Atlantic Paper Stock Ltd. v St. Anne-Nackawic Pulp & Paper Co., who explained that a force majeure clause "generally operates to discharge a contracting party when a supervening, sometimes supernatural, event, beyond control of either party, makes performance impossible". The Court reviewed the case law, which has generally held that parties cannot avoid contractual payment obligations simply because conditions have changed and rendered the contract economically disadvantageous or unprofitable, as opposed to impossible to perform. The Court concluded that "[t]he authorities are clear that the fact that a contractual obligation has become more expensive to perform, even dramatically more expensive, is not a ground to relieve the party of its obligations on the ground of force majeure."

The Court noted that the definition of force majeure in the Licence Agreement required the event to have caused the party to be delayed or unable or restricted from performing its obligation. Here, the pandemic and government responses to it did not restrict Porter from fulfilling its obligations to pay Terminal Fees or provide notice, so the clause was not engaged. Ultimately, the Court held that while Porter was affected by the pandemic, its decision to suspend operations was driven by commercial considerations, principally the decline in revenue caused by a collapse in demand.

Nieuport's obligation to act reasonably

Section 6.22(b) of the Licence Agreement provides that Nieuport "shall, at all times, act reasonably in the exercise of its rights and obligations pursuant to the Licence Agreement…". Porter argued that it was unreasonable for Nieuport to demand payment of full fees, and to increase those fees, during a global health crisis, as it was effectively pushing Porter to operate when it was not safe or advisable to do so.

The Court rejected Porter's argument here, too. Porter's position would mean that throughout the course of the Licence Agreement the Court could be called upon at any time to determine whether the Terminal Fees were "reasonable," and if not to set a reasonable fee for Porter to pay. The parties could have included a price adjustment clause in the Licence Agreement that would have allowed the parties to revisit fees if circumstances changed, but they did not do so. In the absence of a such a clause,

Nieuport cannot be said to have acted unreasonably in exercising its right to demand payment, including the automatic fee increase on Jan. 1 each year.

Key takeaways

The decision in Porter Airlines serves as a reminder that parties generally cannot rely on force majeure clauses to avoid contractual payment obligations simply because conditions have changed and rendered the contract economically disadvantageous or unprofitable, as opposed to impossible to perform. The outcome in each case, however, will depend on the specific wording of the force majeure contract, and whether one can make an argument that the parties intended to shift the risk and excuse performance in such circumstances.

Foreign States are not immune from the jurisdiction of Canadian courts in actions enforcing arbitral awards - *CC/Devas (Mauritius) LTD. & al. v. Republic of India*

(Philippe Boisvert and Katia-M. Medina)

Introduction

Enforcement proceedings against foreign States that refuse to honour international arbitration awards can be challenging. Notably, States often invoke the protection of the *Canadian State Immunity Act* (SIA) to resist enforcement.

The Québec Superior Court (the Court) issued its first ever decision in *CC/Devas (Mauritius) LTD. & al. v. Republic of India* (Devas) regarding sovereign immunity from suit in relation to the enforcement of arbitral awards arising from an investor-state arbitration under the India-Mauritius Bilateral Investment Treaty (BIT). The Court's decision develops and clarifies Canadian law on the enforcement of arbitral awards against foreign States in Québec and in Canada. The investors were represented by a team from BLG composed of Mathieu Piché-Messier, Ira Nishisato, Simon Grégoire, Karine Fahmy, Philippe Boisvert, Amanda Afeich, Dayeon Min, Marc Duchesne and Katia-Maria Medina.

What you need to know

- Devas confirms that the SIA does not preclude the enforcement of international arbitration awards against foreign States in Canada.
- The Court found that the BIT under which the investment was made in the Devas case is a commercial treaty such that the commercial exception of the SIA applied.

- The Court also held that a State that agrees to arbitrate under a BIT pursuant to UNCITRAL Rules, without reserving its right to raise state immunity claims, necessarily waives such claims to state immunity in enforcement proceedings.

Background

The case relates to global enforcement efforts made by investors against the Republic of India (the ROI) to recover more than US$111 million under arbitral awards that remain unpaid. The arbitral awards were rendered pursuant to the BIT and the arbitration was held under the UNCITRAL Rules.

Since late 2021, the investors have seized before judgment US$55 million in Indian assets (US$38 million from the Airport Authority of India (AAI) and US$17 million from Air India) in the hands of the International Air Transport Association (IATA), an international organisation based in Montréal. Since then, the ROI, Air India, AAI and IATA have each retained separate law firms and launched countless challenges and applications to quash the seizures. These challenges are under appeal.

This decision relates to an application by the ROI to dismiss the enforcement proceedings pursuant to the SIA. The issues before the Court were whether the ROI benefitted from State immunity under the SIA, and specifically: (i) whether the commercial exception applied and (ii) whether the waiver exception applied.

The Court dismissed the ROI's application to dismiss pursuant to the SIA, finding that two distinct exceptions of the SIA applied, and declared that the ROI is not immune from the jurisdiction of the Superior Court of Québec.

The commercial activity exception (Section 5 of the SIA)

The Court accepted the investors' arguments regarding the commercial nature of the BIT arbitration, finding that the "Treaty Awards which led to a monetary condemnation against the ROI, result directly from the ROI's failure to honour its contractual obligations and undertakings under the BIT – not the Devas Agreement - that was entered into to, inter alia, incite the citizens of Mauritius to make financial and commercial investments in India".

The Court dismissed the ROI's argument that the dispute related to a sovereign act by the ROI because the expropriation of the plaintiffs' investments was the result of a policy decision taken for national and societal needs. It found that the policy decision of the ROI "cannot be considered in a vacuum without the BIT, a commercial treaty pursuant to which the ROI not only accepted to promote investments in India by Mauritius and its citizens but also offered a certain form of financial protection should their investments be expropriated in whole or in part under specific circumstances more fully set out in the BIT."

The Court therefore held that "by executing the BIT, the ROI decided and accepted to conduct commercial activities within the meaning of Section 5 of the SIA, to promote investments in India."

The waiver exception (Subsection 4(2)(a) of the SIA)

The Court further found that a second exception also warranted the dismissal of the ROI's application. The Court agreed with the Devas investors that "states agreeing to international arbitration under bilateral investment treaties necessarily consent to have orders made against them and necessarily waive claims to state immunity, unless, of course, the state specifically reserved its right to raise its jurisdictional immunity at the execution level in the bilateral investment treaty, which is not the case herein." Accordingly, the Court found that the ROI's participation in arbitration proceedings under the BIT amounted to a clear and unequivocal waiver of its jurisdictional immunity in subsequent enforcement proceedings.

The Court further found that the ROI's agreement to arbitrate while being a signatory of the New York Convention "also amounts to a clear and unequivocal submission of the jurisdiction of the courts seized with the resulting enforcement action".

Notably, the Court observed that the ROI's position "interferes with the good functioning of the international arbitration system which allows parties to have reasonable expectations that an arbitration award may be rendered and enforced.".

Key takeaways

The case clarifies and develops the law relating to the enforcement of arbitral awards against foreign States in Québec in Canada. It establishes that the SIA is not an absolute barrier to the enforcement of arbitral awards against foreign States.

On the commercial activity exception, it confirms that courts must proceed with an in-depth analysis of the entire context of the activity and establishes that a commercial venture made under a BIT will fall under the commercial exception.

On the waiver exception, the decision establishes that a State that agrees to international arbitration under a bilateral investment treaty without reserving its rights to raise jurisdictional immunity at the enforcement stage necessarily waives such claims to state immunity.

This decision therefore confirms Canada's status as an arbitration-friendly jurisdiction and Canadian courts' clear commitment to the principle that arbitral awards are binding and shall be enforced.

Arbitration in insolvency situations – *Peace River Hydro Partners v. Petrowest Corp.*

(Philippe Boisvert and Katia-M. Medina)

Introduction

Commercial parties enter into arbitration agreements for various reasons, often among them efficiency and confidentiality. When one party to an arbitration agreement becomes insolvent, the other party may lose its contractual right to arbitrate disputes, resulting in public court proceedings. This is the key takeaway from the Supreme Court of Canada's (SCC) latest analysis of arbitration in an insolvency context in *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41 (*Petrowest v Peace River*). BLG has also published a longer case commentary of *Petrowest v Peace River*.

What you need to know

- *Petrowest v Peace River* confirmed that an otherwise valid arbitration agreement may, on a case-by-case basis, be inoperative or incapable of being performed, in cases where arbitration would compromise the integrity of the parallel court-ordered receivership/insolvency proceedings.
- The SCC held, however, that even if a party to an arbitration agreement becomes insolvent, courts should generally enforce the arbitration agreement.
- In this case, the decision favored the single judicial proceeding model for an orderly and efficient resolution of the insolvency proceedings pursuant to the *Bankruptcy and Insolvency Act* (BIA), because of the "chaotic" arbitral process that would result under the multiple arbitration agreements at stake.

Background

Peace River Hydro Partners (Peace River) is a partnership formed to build a hydroelectric dam in northeastern British Columbia. Petrowest Corporation (Petrowest is a construction company and a member of the Peace River partnership. Certain work on the dam was subcontracted to Petrowest and its affiliates. Both the main partnership and guarantee agreements between the partners, as well as purchase orders and subcontracts to Petrowest and its affiliates, contained arbitration clauses requiring all disputes arising under the various agreements to be resolved through arbitration.

Two years into the partnership, Petrowest found itself in financial difficulties and was petitioned into receivership. The receiver sued Peace River in the B.C. Supreme Court for sums allegedly owed to Petrowest and its affiliates under the main agreements, and the purchase orders and subcontracts. Peace River applied to the court to stay the court proceedings in favour of arbitration.

Issues relating to arbitration and insolvency

Section 15(1) of *B.C.'s Arbitration Act* provides that if a party to an arbitration agreement commences a lawsuit in a court, the other party may apply to the court for a stay in favour of arbitration. Section 15(2) provides that a court "must" stay the lawsuit unless the arbitration agreement is "void, inoperative or incapable of being performed."

Accordingly, the crux of the dispute before the courts was whether the court-appointed receiver under the BIA was a "party" to the arbitration agreements, and whether the arbitration agreements were "inoperative or incapable of being performed" due to the receivership and the operation of insolvency law.

Below courts' decisions

The chambers judge refused to stay the lawsuit and agreed with the Receiver that the BIA authorized the court discretion to "assert centralized judicial control". The Court of Appeal also refused to stay but based on a different reasoning. It held that the receiver could adopt the agreements for the purposes of pursuing claims, while disclaiming the arbitration clause, relying on the doctrine of separability of the arbitration clause. Accordingly, the receiver was not a "party" to the arbitration clause.

Decision of the Supreme Court of Canada (SCC)

Like the courts below, the SCC dismissed the appeal and refused to stay the litigation. The SCC's reasons differed from both the Court of Appeal and the chambers judge. Justice Côté, writing for the majority, found that the receiver had become a party to the arbitration clause and that there was no residual discretion for the court in deciding whether to grant a stay under the *B.C. Arbitration Act*.

The SCC held that an insolvency situation, on its own, is not a sufficient basis to render an arbitration agreement inoperative. However, in this case, the chaotic nature of the multiple arbitration proceedings, in the face of the simplicity and efficiency of the single lawsuit, exceptionally rendered the arbitration agreements inoperative. In arriving at this conclusion, the SCC set out a number of factors to be applied by courts facing requests to stay proceedings in favor of arbitration in situations when one of the parties is insolvent.

The majority's decision

First, the receiver became a party to the arbitration clauses by operation of ordinary contractual principles. In Justice Côté's view, it is fundamental to the law of contracts that a party cannot take the benefit of a contract while avoiding its burdens. In this case, the receiver's right to sue arose only through the contractual rights of Petrowest and the Petrowest affiliates. It could not therefore avoid the arbitration clauses in those agreements but became a party to them in a similar way to an assignee.

Second, the mandatory language of the *B.C. Arbitration Act* was construed narrowly. Unless an arbitration agreement is "void, inoperative or incapable of being performed" the court cannot, in general, refuse to stay. However, in the majority's view, the BIA does grant courts jurisdiction to find an arbitration agreement "inoperative" where parallel insolvency proceedings are underway, only in certain circumstances.

Third, where the arbitration clause could compromise the orderly and efficient resolution of a receivership, it may become "inoperative" within the meaning of the Model Law, the *B.C. Arbitration Act* and other similar statutes across Canada. This is, according to the majority, a fact-driven exercise, which should be based on five factors:

i. the effect of arbitration on the integrity of the insolvency proceedings;
ii. the relative prejudice to the parties from the referral of the dispute to arbitration;
iii. the urgency of resolving the dispute;
iv. the applicability of a stay of proceedings under bankruptcy or insolvency law; and

v. any other factor the court considers material in the circumstances.

Fourth, those using arbitration should pay close attention to the reasoning of the SCC on three core elements of arbitration law:

- The burden of proof and the "two-step framework" for motions to stay proceedings in favour of arbitration (paras. 76-90).
- The competence-competence principle: the SCC reaffirmed the importance of the competence-competence principle, according to which a challenge to an arbitrator's jurisdiction should generally be decided at first instance by the arbitrator (paras. 38-43).
- The separability doctrine (paras. 166-168): the SCC roundly rejected the B.C. Court of Appeal's invocation of the separability doctrine. Justice Côté recalled that the purpose of separability is to "safeguard arbitration agreements, not imperil them." In general, separability only applies where there is a challenge to the validity of the main contract.

The minority concurred on the result but would have based the refusal of the stay on the terms of the receivership order. In the minority's view, the combined effect of the receivership order was to authorize the receiver to disclaim any contracts, on the one hand, and to sue or bring proceedings, on the other. This meant that the receiver could disclaim the arbitration agreement but sue on the underlying contract.

Key takeaways

The SCC's finding that the receiver, by suing under the debtor's agreements, thereby becomes a party to the arbitration clauses and its rejection of the proposed extension of the separability doctrine, proposed by the B.C. Court of Appeal, provides clarity to the standing of receivers under arbitration agreements.

However, the fact-driven interpretation of when insolvency proceedings may render an arbitration agreement inoperative is less clear, due to the case-specific application of the five factors set out by the majority.

These factors will provide some guidance to courts in future cases where there are insolvency proceedings and arbitration agreements. Where a receiver initiates proceedings under a single agreement and a single arbitration clause, arbitration will likely be the most efficient proceeding. However, most commercial transactions involve more than one contract, often with their own separate arbitration clauses, such that arbitration agreements in these transactions are now less likely to be strictly followed. It may be possible to draft arbitration agreements favoring common rules and arbitral procedures across the various contractual agreements required in a transaction to render a potential arbitration simpler than court proceedings.

In sum, businesses entering into arbitration agreements should beware the risk of their counterparty's insolvency and the fact that any agreements to arbitrate may become inoperative. Following the lead from the SCC, Canadian courts will determine whether arbitration agreements are inoperative by applying a case-by-case analysis based on the factors set out in Petrowest. To mitigate that risk, straightforward arbitration agreements based on a common arbitral procedure and a single set of arbitral rules

should be favoured, to avoid situations where a receiver or court concludes that arbitrating the dispute would be inefficient and chaotic, as was found in Petrowest.

Fiduciary Duties - *Boal v. International Capital Management Inc.*

(Hunter Parsons and Nikhil Pandey)

Introduction

Investment advisors and dealers are often targeted as defendants in proposed class actions. However, class certification for those claims is difficult, in part because of the idiosyncratic nature of client-advisor relationships, especially where a breach of fiduciary duty is alleged. The Ontario Divisional Court's recent decision in *Boal v. International Capital Management Inc.*, 2022 ONSC 1280 (Boal) continues this trend, and serves as a reminder that investment advisors do not automatically owe fiduciary duties to their clients, even where applicable regulatory obligations overlap with duties that may be expected of a fiduciary.

What you need to know

- In Boal, the Divisional Court affirmed a decision of Justice Perell that refused to certify a proposed class action against investment advisors and a mutual fund dealer.
- A majority of the Divisional Court stressed that determining whether investment advisors owe fiduciary duties to their clients is not a "one-size-fits-all" exercise.
- Boal is a reminder that regulatory obligations, including a "best interests of the client" standard and a duty to deal "fairly, honestly and in good faith", do not automatically give rise to a fiduciary duty at common law.

Background

The representative plaintiff, Ms. Boal, commenced a proposed class action in February 2017 arising from her purchase of a high-interest promissory note from her investment advisor, who was also a licensed mutual fund salesperson.

In her claim, Ms. Boal alleged that her investment advisor, his colleague, and the affiliated mutual fund dealer failed to properly disclose that the promissory notes were issued by a company that was controlled by the investment advisors and their family members. Ms. Boal, who was an accredited investor, sought to represent a class of at least 170 clients and asserted numerous causes of action against a number of defendants, including the investment advisors and mutual fund dealer.

By the time of the certification motion in December 2020, the proposed class members had not suffered any investment losses, and it appeared unlikely that they would do so in the future. Accordingly, at certification, Ms. Boal focused solely on causes of action that did not require proof of loss, such as breach of fiduciary duty.

Justice Perell of the Superior Court dismissed the certification motion in its entirety. A divided Divisional Court, which was reviewing the lower court's decision, upheld the decision of Justice Perell.

The test for finding a fiduciary duty owed by financial advisors remains unchanged

To determine whether an investment advisor stands in a fiduciary relationship with his or her client, the Court summarized the five previously established factors as follows:

1. The degree of client vulnerability due to factors such as age or lack of language skills, investment knowledge, education or experience in the capital markets.
2. The degree of trust and confidence that the client places in the advisor and the extent to which the advisor accepts that trust.
3. A history of the client relying on the advisor's judgment and advice and whether the advisor holds him or herself out as having special skills and knowledge upon which the client can rely.
4. The extent to which the advisor has power or discretion over the client's investment account.
5. Professional rules, codes of conduct and regulatory standards help to establish the duties of the advisor and the standards to which the advisor will be held.

An ad hoc fiduciary duty cannot be based on one factor

Ms. Boal's claim rested on the argument that an ad hoc fiduciary duty with an investment advisor can be established on a class-wide basis (for over 170 individual clients) based on Mutual Fund Dealers Association (MFDA) rules and by-laws and the Financial Planners (FP) Code of Ethics alone.

In evaluating whether an ad hoc fiduciary duty arises between a financial advisor and a client, the courts must apply a multi-factor test on a case-by-case, client-by-client basis. Whereas the per se categories describe relationships in which a fiduciary duty is "innate", ad hoc fiduciary relationships arise from the specific circumstances of a particular relationship: *Galambos v. Perez*, 2009 SCC 48 at para. 48. The majority held that finding an ad hoc fiduciary duty based on regulatory rules and obligations would inappropriately turn one factor into the sole factor in determining whether a fiduciary duty exists. The Court noted that the other four factors were not established by Ms. Boal.

The regulatory best interests' standard is not an unqualified common law fiduciary standard

The Court did not agree that the "best interests of the client" regulatory standard in itself creates a fiduciary duty relating to existing or potential material conflicts of interest between the client and advisor. Whether or not a fiduciary duty exists in a financial advisory relationship depends on the facts of each case, including the other factors in the test. Imposing a common law fiduciary standard based on the MFDA rules and by-

laws or the FP Code of Ethics could have a significant impact on participants in the capital markets including those with restricted advice business models (like many mutual fund dealers) and could have negative effects on both investors and capital markets.

Key takeaways

In Canada's common law provinces, the relationship between investment advisors and their clients is not presumed to be fiduciary in nature. Instead, based upon the facts of a particular case, clients may be owed ad hoc fiduciary duties. The existence of an ad hoc fiduciary duty is determined under a contextual, multi-factor analysis. The relevant factors of the analysis include the claimant's vulnerability, the degree of discretionary power exercised by the alleged fiduciary, and applicable professional rules or codes of conduct.

It bears noting that future proposed class actions against investment advisors in Ontario will face an additional hurdle in light of the recently-enacted requirements that common issues "predominate" over individual issues and that a class action be "superior" to all other "reasonably available means" as a means of adjudicating proposed class members' claims. The "predominance" and "superiority" requirements may be especially difficult to establish in cases such as Boal due to the idiosyncratic nature of client-advisor relationships.

Privacy torts – Oswianik, Obodo and Winder

(Hunter Parsons and Nikhil Pandey)

Introduction

In a highly anticipated trilogy of privacy class action certification appeals, the Ontario Court of Appeal refused to certify three class actions based on the tort of intrusion upon seclusion. In *Oswianik v. Equifax Canada Co*., 2022 ONCA 813, *Obodo v. Trans Union of Canada*, Inc., 2022 ONCA 814, and *Winder v. Marriott International, Inc.*, 2022 ONCA 815, the Ontario Court of Appeal held that defendants who collect and store personal information of individuals in databases in connection with their businesses (Database Defendants) cannot be held liable under the tort of intrusion upon seclusion when cyber criminals illegally access or steal that information. This trilogy of decisions represents the first occasion in which a Canadian court of appeal has considered the scope of the intrusion tort since the cause of action was first recognized by the Ontario Court of Appeal in 2012 and will have significant implications for privacy class actions throughout Canada.

What you need to know

- The intrusion upon seclusion tort is not actionable based on an alleged failure to prevent an intrusion by an independent third party, and as a consequence, this

cause of action will generally not be available as against Database Defendants. This may help stem the tide of class actions following data breaches where the representative plaintiff cannot show compensable loss.
- Organizations targeted by cybercriminals remain susceptible to claims of negligence, breach of contract and/or breach of other statutory requirements for failing to properly store and safeguard customer data.
- "Moral damages", which are awarded for certain privacy torts, are not to be awarded in cases of negligence or breach of privacy obligations in a contract because moral damages only arise where the wrongful conduct was intentional.

Background

Owsianik, Obodo and Winder all involved privacy class action certification motions against Database Defendants for the tort of intrusion upon seclusion following large-scale data breaches by third-party cyber criminals.

In Owsianik, the representative plaintiff pleaded that Equifax's "reckless" data management practices constituted an intrusion that would be highly offensive to a reasonable person. A majority of the Court disagreed, holding the tort "has nothing to do with the database defendant." Absent an actual intrusion, the majority said that other available causes of action could adequately control the conduct of the defendant – namely, the tort of negligence. While the majority agreed that *Jones v. Tsige*, 2012 ONCA 32 might not be the final word on the tort of inclusion upon seclusion, they nonetheless declined to extend liability to non-intruders as doing so risked opening the floodgates that the Court in Jones intended to be left firmly closed. The decision included a strong dissent, with reasons that are considerably longer than those of the majority.

In Obodo, the Court applied Owsianik as binding authority and rejected the certification of an intrusion upon seclusion claim on the basis that the tort has nothing to do with a Database Defendant.

In Winder, the claimants attempted to argue that Marriott's behaviour in deceptively obtaining the Class Members' personal information made it a "reckless" intruder. While Justice Perell found that, at most, Marriott's behaviour might have rendered it a "constructive" intruder, he ultimately determined on policy grounds that the tort of inclusion upon seclusion should have a narrow scope of application. Referencing the Jones decision, Justice Perell concluded that extending the tort of intrusion upon seclusion to "constructive" intruders would open the floodgates of litigation and assign liability for conduct that other causes of action already adequately control, such as negligence or breach of contract. Finding no gap in the law of privacy that would be filled by extending the tort to the Database Defendants, Justice Perell held that the tort of intrusion upon seclusion is restricted to those who are "real" intruders – *e.g.* cybercriminals.

Negligence of the defendants cannot be transformed into an intentional tort

The Court of Appeal affirmed that the need to establish that the defendant intentionally committed an intrusive or invasive act is a fundamental and indispensable component of the intrusion tort, which cannot be made out based on an alleged failure to prevent a third party's intrusion into the plaintiff's private affairs.

The Court's rationale was based on a single key point: none of the defendants in these cases were alleged to have met the conduct requirement for intrusion upon seclusion—they were not alleged to have been the parties that actually "intruded upon the plaintiff's private affairs or concerns, without lawful excuse". Rather, the defendants are only alleged to have failed to protect the plaintiffs' personal information from intrusion by cybercriminals.

Moral damages cannot be awarded where an intentional tort is not committed

Intrusion upon seclusion stands out from most other data breach claims because it can result in an award of "moral damages", which can be up to $20,000: Jones. Moral damages do not require the plaintiff to prove they suffered any financial loss or diagnosed injury.

In this case, the Court held that to award moral damages against Database Defendants for what is essentially an allegation of negligence or breach of contract would run contrary to the very purposes underlying such damages, namely: to vindicate the rights infringed and to recognize the intentional harm caused by the defendant.

Theory of vicarious liability rejected

The Court also refused to hold the defendant companies responsible for the actions of cybercriminals on the basis of vicarious liability. The plaintiffs argued that imposing vicarious liability on the corporate defendants would be an appropriate, incremental development in the case law in light of various factors, including the absence of an effective remedy for persons whose information is hacked by an unknown third party. The Court rejected this argument for the following reasons:

- none of the defendants or their agents unlawfully accessed information.
- doing so would create a new and very broad basis for imposing vicarious liability for intentional torts.
- there are other remedies available to affected claimants.
- moral damages should not be awarded against a party that did not invade privacy.

Key takeaways

The Court made clear that organizations that collect and store the personal information of their customers cannot be found liable under the tort of intrusion upon seclusion for breaches conducted by independent, third-party, malicious actors, thereby limiting the causes of action available to plaintiffs. Nevertheless, organizations can be found liable under non-privacy torts, such as negligence or breach of contract.

Notably, these decisions were released while Bill C-27 is in the midst of second reading in Parliament. If passed, Bill C-27 would, among other things, establish the *Consumer Privacy Protection Act* (the CPPA). As currently drafted, the CPPA would create a statutory cause of action for breaches of a number of substantive obligations, including the protection of personal information. However, consistent with the Court of Appeal's decision in the trilogy, some form of compensable harm would still need to be established by a claimant under the CPPA.

On a final note, there will likely be ramifications in the class action context. Previously, class actions were being certified based on the intrusion tort because courts were reluctant to hold that it was "plain and obvious" that the claim could not succeed. Now that the Court of Appeal has confirmed that the tort of intrusion upon seclusion is not available against defendants that have suffered a data breach, there will be pressure on plaintiffs to only advance cases where they can plead compensable harm. This may help stem the tide of class actions following data breaches where the representative plaintiff cannot show compensable loss.

Environmental legislation - The Court of Appeal of Alberta's decision in the Reference re the *Impact Assessment Act*, 2022 ABCA 165.

(Karen Salmon and Briggs Larguinho)

Introduction

The Court of Appeal of Alberta's decision in the *Reference re the Impact Assessment Act,* 2022 ABCA 165 represents the latest battle in the ongoing saga for legislative control over the environment. The Court's decision was quickly appealed by Canada and is set to be heard by the Supreme Court of Canada on March 21 and 22, 2023.

What you need to know

- The majority of the Court of Appeal of Alberta (the Majority) held that the *Impact Assessment Act*, SC 2019 c 28, s 1 (IAA) was an unconstitutional invasion into provincial legislative jurisdiction.
- The Majority found that the main thrust of the IAA was to establish a "federal impact assessment and regulatory regime that subjects all activities designated by the federal executive to an assessment of all their effects and federal oversight and approval."
- As characterized by the majority, the IAA falls into several heads of provincial power. Notably, the Provinces' ability to develop natural resources, the provinces' proprietary rights as owners of their natural resources, the management of public lands, the Provinces' control over local works and undertakings, the provinces' jurisdiction over property and civil rights, and the Provinces' control over matters of a local and private nature.

- This case is currently before the Supreme Court of Canada. There are 29 parties intervening, including seven provinces.

Background

The Government of Canada introduced the IAA in June 2019 as a replacement for the *Canadian Environmental Assessment Act*, 2012. At its core, the IAA is an environmental assessment process designed to designate, review, impose conditions on, and regulate certain resources projects deemed to be in areas of federal jurisdiction.

Specifically, a critical feature of the IAA, is its mechanism for designating certain projects and activities under the Regulations. Projects are designated based on, among other things, their "effects within federal jurisdiction." The meaning of "effects within a federal jurisdiction" is broad. For example, the IAA captures any change to the environment that:

1. occurs outside of a province for which an activity is located,
2. affects the health social, or economic conditions of the Indigenous peoples of Canada;
3. affects fish and fish habitat;
4. affects migratory birds; and
5. affects federal lands.

Once designated, such projects are automatically subjected to a prohibition under section 7 of the IAA unless and until it is decided by the Agency or Minister that the project does not require an impact assessment. If the project does require an impact assessment, the IAA's review and condition process are engaged, which subject the project to additional scrutiny and ultimately a negative or positive decision by the Minister.

The enactment of the IAA and the Regulations was controversial at the outset. Several provinces, including Alberta, Saskatchewan and Ontario, opposed the IAA on the basis that it interfered with provincial jurisdiction over resource management and frustrated economic development, particularly in western Canada. In response, the Lieutenant Governor in Council of Alberta issued Order in Council 160/2019 on Sept. 9, 2019 referring the constitutionality of IAA and the Physical Activities Regulations, SOR/2019-285 (Regulations) to the Court of Appeal of Alberta.

The characterization of the IAA

The Majority began their analysis by noting that the "environment" is not an enumerated head of power in the *Constitution Act*, 1867. As such, the environment may, at times, have provincial and federal aspects. Therefore, when the Federal or a Provincial government wishes to legislate on a matter dealing with the environment, they must ground it to an enumerated power with their jurisdictional competency.

With that in mind, the Majority turned to the typical analysis to determine whether a law is intra vires by (1) characterizing the law; and (2) classifying the law.

After analyzing the IAA's practical and legal effects, the Majority characterized the IAA by examining its dominant purpose — to establish a "federal impact assessment and regulatory regime that subjects all activities designated by the federal executive to an assessment of all their effects and federal oversight and approval."

The Majority noted that the IAA was a significant departure from past Federal environmental assessment legislation as it created a comprehensive regulatory regime rather than being a mere procedural planning tool.

The IAA falls into several areas of Provincial jurisdiction

With the IAA characterized, the Majority completed the analysis by classifying the law. The Majority considered whether the IAA fell under the following Federal heads of power and rejected each one as they relate to the designation of intra-provincial projects:

1. Sea Coast and Inland Fisheries
2. Imperial Treaties
3. Indians and Lands Reserved for the Indians
4. National Concern Doctrine under POGG
5. Trade and Commerce
6. Criminal Law

By contrast, the Majority held that the IAA fell into several heads of provincial power. Namely: the Provinces' ability to develop natural resources, the Provinces' proprietary rights as owners of their natural resources, the management of public lands, the Provinces' control over local works and undertakings, the Provinces' jurisdiction over property and civil rights and the Provinces' control over matters of a local and private nature.

The Majority concluded that the IAA was ultra vires and a "profound invasion into provincial legislative jurisdiction and provincial proprietary rights." They found that the IAA would subordinate the above-mentioned provincial heads of power to federal authority, contrary to what the framers of the *Constitution Act*, 1867 intended.

Key takeaways

The battle for environmental legislative supremacy continues to rage on as the Reference inches closer to a decision from the Supreme Court of Canada. The Reference is one, amongst a growing body of cases, where the courts are grappling with the delineation between the two orders of governments' ability to legislate over the environment. Inevitably, the Supreme Court of Canada's opinion on the constitutionality of the IAA will further clarify the powers of the Federal government and Provinces' ability to govern the environment, and correspondingly, industry in a broad sense.

If constitutional, the IAA has the potential to drastically change projects that were typically regulated by the Province, such as energy development. But these impacts are not confined to energy. The potential reach of the IAA is broad, and it has potential to

impact a litany of intra-provincial projects. As noted by the Majority, that could include projects such as intra-provincial highways, light rail transit systems, flood control, wind and solar farms.

This reach may have practical impacts on businesses that are involved in projects that could be captured by the IAA. As noted by the Majority, the IAA could result in delay and uncertainty when it comes to projects as they become subjected to Federal oversight and regulation under the IAA and Regulations. Overall, the IAA could fundamentally change how many industries, not just energy projects, go about navigating Canada's regulatory landscape.

Manitok Energy Inc (Re), 2022 ABCA 117

(Karen Salmon and Briggs Larguinho)

Introduction

The Court of Appeal of Alberta's decision in Manitok Energy Inc (Re), 2022 ABCA 117 (Manitok) further clarifies the scope of the Supreme Court of Canada decision in *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5 (Redwater) which held that abandonment and reclamation liabilities must be dealt with before any distribution to creditors, including secured creditors, of an insolvent oil and gas company's estate. In Manitok the Court specifically considered which assets must be used to satisfy those abandonment and reclamation obligations.

What you need to know

- When it comes to a receiver's obligation to satisfy outstanding abandonment and reclamation obligations using estate assets, there is no distinction between previously sold oil and gas "assets unrelated to the environmental condition or damage," and the unsold assets remaining in the estate which are related to environmental condition or damage.
- Reclamation and abandonment obligations are inherent in oil and gas properties and commence as soon as extraction does. Abandonment and reclamation obligations exist independently of any enforcement actions by the regulator, such that the timing of when a regulatory order to discharge such obligations is issued does not affect the receiver's public duty to use estate assets to comply with the order.
- The fact that certain valuable assets have been converted to cash prior to a regulatory order being issued does not insulate the sale proceeds from the receiver's obligation to use such proceeds to comply with valid regulatory orders.

Background

Two companies filed builders' liens against Manitok Energy Inc. (Manitok) for unpaid equipment and services. Shortly after, Manitok became insolvent and filed for bankruptcy. Like most bankrupt estates, Manitok's estate was composed of assets with value and assets with negative value. As is common with insolvent oil and gas

producers, the assets with negative value were largely those with significant abandonment and reclamation obligations. Abandonment and reclamation obligations arise when a oil and gas well has been fully depleted. Certain activities must be undertaken to seal off the well safely and the surface of the land must be reclaimed.

The receiver of Manitok (the Receiver) entered into an agreement to sell some of Manitok's valuable assets. Part of that sale required the purchaser to assume the abandonment and reclamation obligations of the assets that it was purchasing. The sale was approved by a Sale and Vesting Order which required holdbacks to stand in place of the builders' liens as they were vacated as part of the sale.

Before the sale could close, the Supreme Court of Canada released Redwater. Redwater held, among other things, that a receiver in bankruptcy is required to use assets from a bankrupt oil and gas estate to satisfy reclamation and abandonment liabilities, and that those liabilities must be dealt with before any distribution to the creditors, including secured creditors. The parties revised the sale agreement, but the holdback provisions remained unchanged, and the sale of those assets close with the proceeds being held in trust. After the closing, the Alberta Energy Regulator issued abandonment orders on the assets not included in the sale.

The Receiver brought an application for advice and direction. The key issue before the Court was whether the estate had to satisfy the abandonment and obligations with the proceeds it was holding from the assets already sold, prior to making distributions of the holdbacks to the holders of the builders' liens.

The Court of King's Bench (then Queen's Bench) found Redwater and Manitok distinguishable. The Court reasoned that, unlike Redwater, Manitok dealt with sales proceeds from assets that had already been sold prior to any regulatory orders being issued. As such, the sale proceeds were "unrelated" to the remaining assets in the estate, which were the only assets subject to the abandonment and reclamation obligations created by the regulatory orders. Because the sales proceeds were found to be "unrelated" to the environmental condition or damage at issue, the Chamber's Judge found that the builders' liens were entitled to be paid out from the sales proceeds, in priority to such proceeds being used by the receiver towards compliance with the regulatory orders.

The concept of "unrelated" assets is inconsistent with Redwater

The Court of Appeal overturned the Chambers Judge's decision on the basis that it is inconsistent with Redwater to draw a distinction between assets that had been sold prior to regulatory orders being issued, and the other assets remaining in the estate at the time a regulatory order is issued. Following Redwater's finding that the Alberta Energy Regulator treats all assets of an oil and gas company as a package, the Court of Appeal held that it would render Redwater meaningless to insulate the sales proceeds from previously sold assets from the abandonment and reclamation obligations associated with unsold assets remaining in the bankrupt estate.

The reality is that those assets that were "related" to the extent abandonment and reclamation obligations had a negative value and remained unsold in the estate

specifically because of such obligations. As stated by the Court of Appeal — "[t]he whole point of Redwater, however, is that the proceeds of the sale of the valuable assets must be applied towards reclamation of the worthless orphaned assets."

If the proceeds of sale from a bankrupt corporation's valuable assets were unencumbered by the abandonment and reclamation obligations of the unsold assets, there would never be any proceeds from the bankrupt's estate available to satisfy such abandonment and reclamation obligations.

Therefore, the Court of Appeal set aside the Chambers Judge's decision and ruled that the abandonment and reclamation obligations must be satisfied before paying the builders' liens.

Abandonment and reclamation obligations exist independently of any actions by the Alberta Energy Regulator

The Court of Appeal also rejected the argument that the reclamation and abandonment obligations only arose once the Alberta Energy Regulator acted. While the issuance of a regulatory order places a public duty on the receiver to comply with the order by taking immediate steps to satisfy abandonment and reclamation obligations, such obligations are inherent in oil and gas properties. The Court relied upon Redwater and others, finding that these obligations commence as soon as resource extraction commences. This obligation is independent of action by the Alberta Energy Regulator to issue abandonment or reclamation orders. Therefore, even when a receiver has sold valuable assets prior to a regulatory order being issued, the abandonment and reclamation obligation associated with any unsold assets nonetheless always existed. The subsequent issuance of a regulatory order transforms these pre-existing obligations into a duty to take immediate steps to satisfy the obligations, utilizing whatever assets are in the estate.

Whether non-oil and gas assets are subject to the rule from Redwater was subsequently addressed

The Court of Appeal in Manitok declined to answer this question to whether non-oil and gas assets must be used to satisfy abandonment and reclamation obligation, because the funds at issue before it were the result of the sale of oil and gas assets. We note however, that question was later clarified to a significant extent in a subsequent December 2022 King's bench decision *Orphan Well Association v Trident Exploration Corp.*, 2022 ABKB 839 (Trident). In Trident the Court found it would "make no sense to differentiate real estate assets from other assets used in that business, just as it made no sense in Manitok to carve out economic licensed assets from uneconomic ones. In either case, the result would be to undermine the policy purposes upon which the super priority principle is based." Thus proceeds from the sale of real estate and other non-licenced assets (*i.e.*, non-oil and gas assets) were available to satisfy those end-of-life obligations.

Key takeaways

The Court of Appeal clarified the nature of the public duty on receivers to discharge an insolvent oil and gas company's end-of-life obligations. This duty arises as soon as resource is extracted from the property and must be satisfied with any available oil and gas assets prior to distribution to creditors, whether lienholders, secured creditors or otherwise.

This decision provides important clarity around the Redwater decision and further limits the circumstances in which secured creditors may recover in the face of outstanding abandonment and reclamation liabilities. Further, Manitok and Trident together foreclose the "related" vs "unrelated" argument parties advanced to try to create an exception to the general rule from Redwater.

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